

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7045

United States Court of Appeals For the Second Circuit

ARROW NOVELTY COMPANY, INC.,
Plaintiff-Appellee,
v.

ENCO NATIONAL CORPORATION,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

JOINT APPENDIX

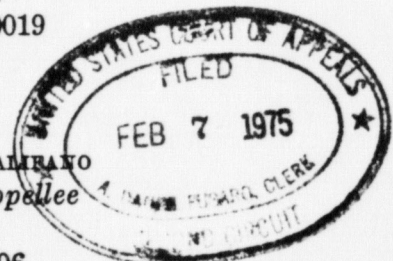
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CERTIFICATE OF SERVICE

I hereby state under Penalty of Perjury that a True Copy of the foregoing is today mailed to Counsel for the opposing parties.

Date: 2/14/75 *[Signature]*



4

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TABLE OF CONTENTS

	PAGE
The Relevant Docket Entries	1a
Complaint	3a
Answer	8a
Opinion	10a
Judgment and Decree	18a
Notice of Appeal	19a
Testimony	20a

TESTIMONY

Witnesses for Plaintiff

Isidore Brown:	
Direct	20a
Cross	36a
Deposition of Daniel Steinberg:	
By Mr. Patton	44a
Deposition of Robert C. Stevens:	
By Mr. Patton	59a
John Passela:	
Direct	66a
Cross	69a
Redirect	71a

Witnesses for Defendant

Daniel Steinberg:	
Direct	74a
Cross	81a

II

	PAGE
Herbert Bendell:	
Direct	94a
Cross	131a
Herbert T. Ficker:	
Direct	150a
Cross	153a

EXHIBITS

For Plaintiff

1—Copyright Certificate No. Gp 23714	157a
--	------

For Defendant

A—Enco Art Work	160a
C—Picture of Empire State Building	162a
D—Enco Art Work	165a
F—Postcard Containing Artist's Rendition of the World Trade Center	167a
G—Enco Art Work	169a
I—Enco Art Work	171a
K—Enco Art Work	173a
M—Enco Art Work	175a
N—Enco Art Work	177a
P—Enco Art Work	179a
R—Enco Art Work	181a
V—Design for Enco Accused Tray	183a

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Appeal No. 75-7045

ARROW NOVELTY COMPANY, INC.,

Plaintiff-Appellee,

v.

ENCO NATIONAL CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

The Relevant Docket Entries

1. Filed complaint and issued summons on March 11, 1974.
2. Filed ANSWER of defendant to the complaint April 24, 1974.
3. Filed OPINION #41387...For the reasons stated, the Court concludes that the defendant has infringed upon plaintiff's copyright and directs that judgment be entered in favor of plaintiff on the question of defendant's liability for infringement. Judgment shall also be entered enjoining defendant from further infringing upon plaintiff's copyright. Gagliardi, J. mailed notices. - November 1, 1974.

4. Filed JUDGMENT and DECREE on December 26, 1974 - Ordered that the defendant is liable to the plaintiff for infringement of plaintiff's copyright protected by copyright certificate No. Gp 23714 and defendant is hereby permanently enjoined from further infringing upon plaintiff's said copyright by making or selling any copies of the item marked and identified at trial as plaintiff's exhibit 3 in evidence. Gagliardi, J. judgment entered 12/20/74 Clerk.
5. Filed Notice of Appeal on January 13, 1975.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARROW NOVELTY COMPANY, INC.,

Plaintiff

v.

ENCO NATIONAL CORPORATION,

Defendant

Civil Action No. 74-1119 LPG

C O M P L A I N T

1. Plaintiff Arrow Novelty Company, Inc. (hereafter "Arrow"), is a corporation duly organized and existing under the laws of the State of New York, with its principal place of business at 143 Second Street, Jersey City, New Jersey.

2. Upon information and belief, defendant Enco National Corporation, also sometimes conducting business under the name Parksmith, Incorporated (hereafter "Enco"), is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 120 East 23rd Street, New York, New York.

Jurisdiction

3. Jurisdiction of this action arises under the copyright laws of the United States and is founded upon 28 U.S.C. §§1338(a) and (b) and 1331; and 17 U.S.C. §§101 and 112.

First Claim For Relief

4. At all times relevant to this claim, plaintiff Arrow has been a corporation duly organized under the laws of a state of the United States, thus qualifying by citizenship to hold a copyright.

5. Prior to December 21, 1959, plaintiff Arrow by its agents, servants and employees designed, developed, created and produced a wholly original and unique work of art, namely, a decorative tray and/or wall hanging, made of pressed wood, depicting on its surface in raised sculptured form various scenes of the City of New York in a collage setting.

6. Plaintiff Arrow's decorative tray consists in whole or in part of a wholly original and unique depiction of scenes of New York City and is a copyrightable subject matter under the copyright laws of the United States, 17 U.S.C. §5.

7. On or about December 21, 1959, plaintiff Arrow complied, in all respects, with the Act of March 4, 1909, as amended, and all other laws governing copyrights, and assured to itself thereby the exclusive rights and privileges in and to the copyright of said work of art, and thereafter, on or about February 29, 1960, received from the Registrar of Copyrights a certificate of registration dated and identified as follows: "Form G, Reg. No. Gp 23714, Sculpture, Design of New York City on Tray."

8. Since February 29, 1960, plaintiff Arrow's work of art has been published by plaintiff Arrow and copies of it have been manufactured and sold by plaintiff Arrow in strict conformity with the provisions of the Act of March 4, 1909, and all other laws governing copyright. All copies of Arrow's work have been plainly and conspicuously marked by the standard copyright symbol ©.

9. Since February 29, 1960, plaintiff Arrow has been and still is the sole proprietor of all right, title and interest in and to the copyright in said work of art.

10. Since March 1, 1974 or earlier and continuing thereafter to date, defendant Enco has infringed and continues to infringe upon plaintiff Arrow's copyright by producing and placing upon the market a decorative tray with raised artistic sculptured scenes of New York City which is a direct copy of and identical or substantially similar to plaintiff Arrow's copyrighted work.

11. At all times during defendant Enco's infringement of plaintiff Arrow's copyright, defendant Enco has distributed its work widely through retail sales in the New York area.

12. Defendant Enco's infringement of plaintiff Arrow's copyright has been willful and deliberate.

13. Prior notice by plaintiff Arrow to defendant Enco that defendant Enco has infringed plaintiff Arrow's copyright would be unavailing, and service of this complaint constitutes notice to defendant Enco of the infringement.

Second Claim For Relief

14. Plaintiff Arrow repeats and realleges Paragraphs 4, 5 and 6 as if herein set forth in full.

15. Beginning no later than March 1, 1974 and continuously since that time, defendant Enco has been manufacturing and selling for profit the original, unique and valuable artistic work of plaintiff Arrow.

16. Defendant Enco's copies of plaintiff Arrow's work of art are substantially and confusingly similar with plaintiff Arrow's work and thereby sales of the defendant Enco's work creates confusion among buyers, palming off and constitutes an unfair trade practice.

17. Defendant Enco's conduct constitutes unfair competition against plaintiff Arrow, to plaintiff Arrow's irreparable damage.

18. Defendant Enco's unfair trade practice and unfair competition have been willful and deliberate.

WHEREFORE, Plaintiff Arrow Demands Relief As Follows:

1. That the defendant Enco be enjoined temporarily and permanently from manufacturing, distributing and selling the said work and otherwise from infringing upon plaintiff Arrow's copyright.

2. That the defendant Enco be required to deliver up to be impounded during the pendency of the action, upon such terms and conditions as the Court may prescribe, all copies of its infringing work.

3. That the defendant Enco deliver up for destruction all of the infringing copies of the said work as well as all plates, molds or other means for making such infringing copies.

4. That defendant Enco be required to pay to plaintiff Arrow such damages as plaintiff Arrow has sustained in consequence of defendant Enco's infringement of plaintiff Arrow's copyright, and to account to plaintiff Arrow for all gains, profits and advantages derived by defendant Enco by its infringement of plaintiff Arrow's copyright, or in the alternative, such damages as to the Court shall appear proper under 17 U.S.C. §101.

5. That defendant Enco be required to pay to plaintiff Arrow all damages arising out of defendant Enco's unfair trade practice and unfair competition.

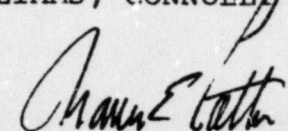
6. That defendant Enco be required to pay to plaintiff Arrow punitive damages in the amount of \$250,000.00.

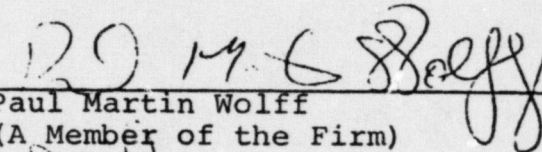
7. That defendant Enco pay to plaintiff Arrow the costs of this action and reasonable attorneys' fees.

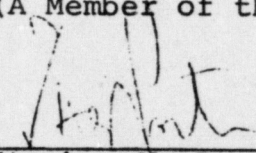
8. That the Court grant to plaintiff Arrow such other and further relief as is just, proper and necessary.

WILLIAMS, CONNOLLY & CALIFANO

By


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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ARROW NOVELTY COMPANY, INC., :

Plaintiff, : Civil Action No.
: 74-1119 LPG

- vs -

ENCO NATIONAL CORPORATION, :

Defendant. :
-----x

ANSWER

Defendant answers the numbered paragraphs of plaintiff's complaint as follows:

1. Admitted upon information and belief.
2. Admitted.
3. Admitted.
4. Admitted.

5. Defendant lacks sufficient knowledge or information to form a belief as to the allegations contained in paragraph 5 of the complaint and therefore denies the same.

6. Defendant lacks sufficient knowledge or information to form a belief as to the allegations contained in paragraph 6 of the complaint and therefore denies the same.

7. Defendant lacks sufficient knowledge or information to form a belief as to the allegations contained in paragraph 7 of the complaint and therefore denies the same.

8. Defendant lacks sufficient knowledge or information to form a belief as to the allegations contained in paragraph 8 of the complaint and therefore denies the same.

9. Defendant lacks sufficient knowledge or information to form a belief as to the allegations contained in paragraph 9 of the complaint and therefore denies the same.

10. Denied.
11. Denied.
12. Denied.
13. Denied.

14. Defendant incorporates herein with the same force and effect as if set forth herein in full its response to paragraphs 4, 5 and 6 of the complaint.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE
DEFENDANT ALLEGES THAT:

19. Defendant has not copied plaintiff's copyrighted work.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE
DEFENDANT ALLEGES THAT:

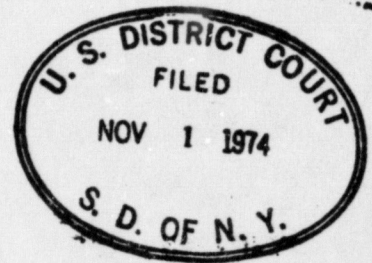
20. Plaintiff's second claim for relief fails to state a cause of action upon which relief can be granted.

WHEREFORE, the defendant prays that the complaint be dismissed and that defendant be awarded reasonable attorney's fees and costs and such other and further relief as the Court may deem just and proper.

Respectfully submitted,
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By _____
Peter T. Cobrin

COPY



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ARROW NOVELTY COMPANY, INC.,

Plaintiff,

: 74 Civ. 1119

-against-

ENCO NATIONAL CORPORATION,

Defendant.

: OPINION

: #41387
-----x

A P P E A R A N C E S :

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Attorneys for Defendant

Peter P. Cobrin, Esq. and
David Kirschstein, Esq.
Of Counsel

GAGLIARDI, D. J.

This is a copyright infringement action. The copyrighted item which is the subject matter of the action is described in the complaint as "a decorative tray and/or wall hanging, made of pressed wood, depicting on its surface in raised sculptured form various scenes of the City of New York in a collage setting." It is alleged that defendant has been infringing plaintiff's copyright since at least March 1974 by producing and marketing an identical or substantially similar decorative tray. Defendant contends that its tray was independently created and not copied from plaintiff's tray. A trial to determine the question of liability was had before this court on September 10 and 11, 1974.

Plaintiff and defendant are both New York corporations engaged in the manufacture and marketing of decorative and souvenir items. Both companies sell their products to retail stores in various locations throughout the United States. The parties are direct competitors in the wholesale marketing of souvenir items in New York City, and certain products of both plaintiff and defendant are carried and sold in several of the same retail outlets. The products are sold to New York City retailers through company salesmen who personally visit these customers from time to time.

Plaintiff has continuously marketed its New York City souvenir tray through sales to retail outlets in New York

City since about 1959. On February 29, 1960, plaintiff filed an application for copyright registration of its tray with the United States Copyright Office and later received copyright certificate No. Gp23714 to cover the tray. Defendant began marketing its tray in New York City sometime in March 1974.

The court has carefully examined both trays and concludes that there is a remarkable similarity between the two. Each tray depicts scenes of New York City in raised sculptured form. The trays are identical in color, nearly identical in size, and similar in shape. Three principal prominent landmarks -- Statute of Liberty, Empire State Building, Rockefeller Center -- are the same. The Statute of Liberty is in the center of both, while the positions of the other two landmarks are reversed. The lettered caption, "New York City", is positioned in the top center of both trays and the letters are approximately the same size on both. The lettered words for the three prominent landmarks appear in the same place below each figure on a raised banner and the letters are approximately the same size on both trays. There is a harbor line running horizontally across the middle of both trays and there are boats in the harbor. The United Nations Building is positioned in the same place on both trays and the smaller less significant buildings on the left and right sides of each are similar. Both trays have slightly raised

background clouds of very similar appearance, and both have a rose on the upper right side. There are on both trays grooved background lines projecting outward from the center with interspersed heavier accent lines. On the back of each tray is a hanging device and four small legs.

The trays are not identical as, of course, there are minor differences between the two. For example, in the place of the Chrysler Building, which appears on the plaintiff's tray, defendant's tray depicts the World Trade Center, which was not in existence at the time plaintiff's tray was designed. While a verbal description of the trays may perhaps be of some use, the overall striking similarity between the two is plainly evident and can best be conveyed by a visual inspection.

Defendant contends that its tray was independently created and that its officers neither saw nor knew of plaintiff's tray prior to this lawsuit. Daniel Steinberg, a vice-president of defendant, and Herbert Bendell, a buyer for defendant, testified at trial regarding the derivation of defendant's product. The following is a summary of the testimony of Mr. Steinberg and Mr. Bendell. While in Las Vegas in January 1973, Mr. Steinberg purchased at the Circus Circus Hotel a plastic three-dimensional tray which depicted certain Las Vegas landmarks. The Las Vegas tray contained no copyright notices, trademarks or tradenames, and Mr. Steinberg purchased

the tray with the thought that defendant might market similar trays for other geographic locales. After discussions with Mr. Bendell, whose responsibilities include arranging for the design and manufacture of certain of defendant's products, it was decided that a tray depicting New York City and its landmarks would be manufactured in the Orient for defendant. It was agreed that the New York City tray should be substantially identical to the Las Vegas tray in size, shape and color.

While in Japan in the spring of 1973, Mr. Bendell made arrangements for the manufacture of a New York City tray by a Japanese company called Matsudo. The Las Vegas tray was given to Matsudo by Mr. Bendell, who told them that he wanted a New York City tray which was to be the same in shape, color and configuration. Mr. Bendell further instructed Matsudo in detail as to the exact design and layout of the New York City tray. To assist Matsudo in designing the shapes of the landmarks and waterfront, Mr. Bendell provided Matsudo with various art work, a picture and certain three-dimensional objects which had all been independently created for past projects by defendant's art department. Matsudo prepared a proposed layout for defendant's tray with the aid of these materials pursuant to Mr. Bendell's instructions. After certain changes were made pursuant to further instructions from Mr. Bendell, a final layout was approved.

Plaintiff's ownership of the copyright is undisputed

here, and resolution of the question of alleged copying by the defendant will thus be dispositive on the issue of liability. See 2 M. Nimmer, Copyright §141 (1974). Copying need not be proved directly and may be inferred by proof that the defendant had access to the plaintiff's copyrighted work and that the two items are substantially similar. Armstein v. Porter, 154 F.2d 864 (2d Cir. 1946). If the plaintiff meets its burden of establishing access and similarity, the defendant must then come forward with credible evidence of independent creation to negative the inference of copying. See Charter Fabrics v. Hale Fabrics Corp., 171 U.S.P.Q. 190 (S.D.N.Y. 1971); 2 M. Nimmer, Copyright §139.4 (1974).

Access is defined as or may be inferred from a reasonable opportunity to view or copy. Blaxon, Inc. v. Deluxe Game Corp., 268 F. Supp. 416, 422 (S.D.N.Y. 1965); 2 M. Nimmer, Copyright §142.1 (1974). As so defined, plaintiff has sufficiently established access in this case. The parties are direct competitors in the New York wholesale souvenir market and sell their products to several of the same retail stores in Manhattan. Salesmen of both companies visit these retail outlets and have thus had a reasonable opportunity to view each other's products. Moreover, Daniel Steinberg, defendant's vice president of sales, testified about his purchase of a souvenir tray while in Las Vegas with the thought that defendant might sell a similar item in other locales. Mr.

Steinberg further testified on cross-examination that he had visited retail souvenir outlets in New York City and viewed competitors' products from time to time over the past twelve years. In view of this testimony, the court concludes that not only was there a reasonable opportunity to view but it is indeed inconceivable that Mr. Steinberg never saw the tray which was successfully marketed by the plaintiff, a direct competitor, in New York City for over a decade.

Although evidence of striking similarity may alone give rise to an inference of copying (Arnstein v. Porter, supra), proof of access without substantial similarity cannot create such an inference. Arc Music Corp. v. Lee, 296 F.2d 186 (2d Cir. 1961). The test for substantial similarity is a necessarily vague one, that is, whether an ordinary lay observer would overlook the dissimilarities and regard the two works as essentially the same. Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021 (2d Cir. 1962); Peter Pan Fabrica, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960). Measured by this standard, the two works in the instant case are clearly substantially similar.

In view of this substantial similarity, the court finds defendant's contention of independent creation not

credible. Mr. Bendell has testified that he instructed the Japanese manufacturer as to the precise design and layout of defendant's New York City tray. While the idea of such a tray could have been derived from the Las Vegas tray, the specific and tangible expression of that idea, embodied in defendant's tray, could not have. See Uneda Doll Co., Inc. v. P. & M. Doll Co., Inc., 353 F.2d 788 (2d Cir. 1965). The defendant's expression of the idea, i.e., the specific layout and design of the tray, bears such a remarkable resemblance to plaintiff's expression of the idea as to render the inference of copying inescapable and the contention of independent creation unbelievable.

The foregoing constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ. P.

For the reasons stated, the court concludes that defendant has infringed upon plaintiff's copyright and directs that judgment be entered in favor of plaintiff on the question of defendant's liability for infringement. Judgment shall also be entered enjoining defendant from further infringing upon plaintiff's copyright.

So Ordered.

/s/ P. Gayardi
U.S.D.J.

Dated: New York, New York
October 30, 1974.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARROW NOVELTY COMPANY, INC.,

Plaintiff

v.

ENCO NATIONAL CORPORATION,

Defendant

74 Civ. 1110 PG

JUDGMENT AND DECREE

This matter having come on before the Court for trial on September 10 and 11, 1974, and the Court having directed that judgment be entered in favor of plaintiff in accordance with its Opinion of October 30, 1974,

IT IS ORDERED, ADJUDGED AND DECREED that

(1) the defendant is liable to the plaintiff for infringement of plaintiff's copyright protected by copyright certificate No. GP 23714, and

(2) the defendant is hereby permanently enjoined from further infringing upon plaintiff's said copyright by making or selling any copies of the item marked and identified at trial as plaintiff's Exhibit 3 in evidence.

S/Lee P. Goughland, S

Dated: New York, New York

12/20/74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
1/13/75

ARROW NOVELTY COMPANY, INC.,

Plaintiff,

v.

ENCO NATIONAL CORPORATION,

Defendant.

74 Civ. 1119 LDC

NOTICE OF APPEAL

Notice is hereby given that defendant, ENCO NATIONAL CORPORATION, hereby appeals to the United States Court of Appeals for the Second Circuit from the JUDGMENT entered on December 20, 1974 which ORDERED, ADJUDGED and DECREED that:

(1) the defendant is liable to the plaintiff for infringement of plaintiff's copyright protected by copyright certificate No. CP 23714, and

(2) the defendant is hereby permanently enjoined from further infringing upon plaintiff's said copyright by making or selling any copies of the item marked and identified at trial as plaintiff's Exhibit 3 in evidence.

Respectfully submitted,

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* * *

I S I D O R E B R O W N, called as a witness on
behalf of the plaintiff, being first duly
sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PATTON:

Q Mr. Brown, for the record state your present
business address.

A My business address is 143 Second Street, Jersey
City, New Jersey.

Q By whom are you employed, sir?

A I am employed by the Arrow Novelty Company.

Q What offices do you presently hold in that
company?

A I am the president of the company.

Q How long have you been president of Arrow?

A I believe about four years.

Q About four years?

A Yes.

Q Since about 1970?

A Yes.

Q How long have you been employed by Arrow al-
together?

A I think since 1961. 1961 -- I am not sure of the
exact date.

lp

Brown-direct

11

Q Very generally, Mr. Brown, simply to set the stage, what are your duties and responsibilities as president?

A I do all the domestic purchasing, the overseas purchasing; I oversee the general day-to-day operations of the company, including the factory, the salesmen and so forth.

Q You are the operating head of the company?

A I am, sir.

Q Will you please describe generally, to set the stage again, the business of Arrow Novelty Company?

A Arrow Novelty Company is in the souvenir novelty business. A certain portion of our goods are manufactured by us; a certain portion of our goods are manufactured for us, and a certain portion of our merchandise is imported from overseas.

Q How long has Arrow been in the business of marketing souvenir items?

A They were incorporated March 30, 1918.

Q Does Arrow market its souvenir items in the New York City area?

A Yes, we do.

MR. PATTON: I would ask that the clerk first mark this as Plaintiff's Exhibit 1.

lp

Brown-direct

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THE COURT: Any objection?

MR. COBRIN: No, your Honor.

THE COURT: It will be received in evidence as Plaintiff's Exhibit 1.

(Plaintiff's Exhibit 1 received in evidence.)

BY MR. PATTON:

Q Mr. Brown, I show you Plaintiff's Exhibit 1 and ask you if you can identify that, please?

A This is a registration of a claim of copyright that Arrow Novelty owns.

Q What item does that cover, sir?

A That covers our New York City bowl 42-85.

Q What is the date on that certificate of copyright registration?

A 1955, I believe -- I am sorry, that is the publication date.

MR. PATTON: I don't want to spend that much time. If I may, your Honor, the date of this registration is actually February 29, 1960. The item was deposited with the Copyright Office in December, 1959. The date of the first publication is October, 1955.

THE COURT: It is conceded that all this was prior to the manufacture by the defendant of its bowl, is

lp

Brown-direct

13

1
2 that correct?

3 MR. PATTON: Yes.

4 Now would the clerk mark this as Plaintiff's
5 Exhibit 2 for identification.

6 THE COURT: Any objection?

7 MR. COBRIN: Yes, there is an objection, and the
8 basis for the objection is this, your Honor: the copyright
9 certificate, which is Plaintiff's Exhibit 1 in evidence,
10 was issued as a result of someone depositing with the
11 Copyright Office two identical items.

12 Now, when the Copyright Office gets two identical
13 items they issue the certificate. Unless there is some
14 connection to show that Plaintiff's Exhibit 2 for identi-
15 fication is precisely what was deposited with the Copyright
16 Office, it is entirely irrelevant to this lawsuit.

17 MR. PATTON: I confess, your Honor, I am not
18 sure I understand the objection.

19 THE COURT: He is saying he wants the chain of
20 proof to show that Exhibit 1 and Exhibit 2 would cover the
21 same item.

22 MR. COBRIN: Exactly.

23 MR. PATTON: I intend to do that through the
24 witness.

25 THE COURT: All right, we will receive it in

lp

Brown-direct

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1 evidence subject to connection.

2
3 MR. COBRIN: Your Honor, I might point out that
4 the witness has been at Arrow --

5 THE COURT: If he can't connect it I won't
6 receive it. If he can, that is something else.

7 (Plaintiff's Exhibit 2 received in
8 evidence.)

9 BY MR. PATTON:

10 Q I show you Plaintiff's Exhibit 2. Can you
11 identify that, Mr. Brown?

12 A Yes. This is our bowl 42-85.

13 Q To your knowledge, Mr. Brown, is that bowl the
14 one which is the subject of this copyright registration
15 certificate and the one a copy of which was deposited with
16 the Copyright Office?

17 A Yes, because the bowl has never been changed, to
18 my knowledge.

19 Q Mr. Brown, who manufactures Plaintiff's Exhibit 2?

20 A Multi-Products, a company in Chicago.

21 Q Could you explain very briefly under what arrange-
22 ments they manufacture that item?

23 A They manufacture this item for us exclusively.

24 Also they make other bowls with different designs
25 exclusively for us.

p

Brown-direct

15

Our competition for many, many years has tried to get our items, and has on many occasions approached Mr. Stevens --

MR. PATTON: That goes beyond the question.

THE WITNESS: I am sorry.

Q They manufacture that for Arrow?

A Yes.

Q And you market that item, is that correct?

A We market it, yes, sir.

Q Is that item, that New York City bowl, Plaintiff's Exhibit 2, is that marketed in retail -- I don't want to ask a leading question -- where is that marketed?

A It is marketed to major retailers that we sell in the New York City area, whether it be the airports and so forth.

Q I would like you to state, then, please, what are some of the large retail outlets in the New York City area through which you sell this New York City bowl?

A We sell Broadway Book; we sell Statue of Liberty; we sell the major accounts out at the airports, like Airport Toys, and so forth, and other accounts in the Broadway area.

Q Can you name a few others?

A Sky Shef we sell.

lp

Brown-direct

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Q Any others?

A We sell many, many others. Off the top of my head I really can't give you the exact names. I think we have actively perhaps 75 to 100 accounts in the New York City area that would buy this item from us.

Q Di you sell to F.W. Woolworth?

A We do.

Q Do you sell to Kresge, five and dimes like that?

A Yes, Kresge, Newberry's, Fishman, just to name a few; Newark Airport.

Q Now to your knowledge, Mr. Brown, as far as you know, does Plaintiff's Exhibit 2 and each copy of it that is manufactured by Multi-Products for you bear this symbol that is on this exhibit, a C in a circle, Arrow Novelty Company?

A It does.

Q Now you mentioned a number of retail stores in New York City to which you sell this bowl, Defendant's Exhibit 2. Do you have occasion, or have you had occasion over the last, say, roughly, five, seven, eight years, to visit these stores yourself personally?

A Yes. On many occasions I have gone to these retail stores myself to introduce myself, to chat with the customers; just in general I visited them often.

lp

Brown-direct

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Q Now, have you heard of Enco National?

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A Yes.

4

Q How long have you heard of them?

5

A As long as I am in the souvenir business.

6

I guess 13 or 14 years.

7

Q To your own personal knowledge, based upon your

8

visits to the retail stores in this area, does Enco sell

9

to the same retail stores?

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A They do.

11

Q All of them?

12

A Yes.

13

Q And that is based on your own knowledge from

14

visiting the stores?

15

A That is based on my own knowledge. I see their

16

products and I see others.

17

Q Now, did there come a time when you learned

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whether or not any other company was marketing a New York

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City bowl?

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A No.

21

Q I beg your pardon?

22

A No. * * *

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lp

Brown-direct

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Q Perhaps I misstated it. I meant any company other than Arrow. I am sorry if I misstated it.

Your answer?

A I found out that Enco was manufacturing this bowl. In fact, I found that they had placed an order in the Orient --

Q Let us do this sequentially.

MR. PATTON: I would like this marked as Plaintiff's Exhibit 3, please.

THE COURT: Any objection?

MR. COBRIN: No.

MR. PATTON: Your Honor, I move the admission of these three items, by the way.

THE COURT: He says he has not objected.

MR. COBRIN: I have an objection to Exhibit 2.

THE COURT: Well, it is in evidence. The question of whether it is connected is something else again.

(Plaintiff's Exhibit 3 received in evidence.)

lp

Brown-direct

19

Q I will show you this one. Can you identify this?

MR. COBRIN: Your Honor, I object. That speaks for itself.

THE COURT: I know it does, but the question is whether he can identify what it is.

A Yes. I first saw this bowl --

Q That was my next question. When did you first see it?

A I first saw this bowl in a factory outside of Nagoya in March of last year, of 1973, I believe, March or April.

Q Could you state the circumstances under which you saw Plaintiff's Exhibit 3?

A Yes. I had occasion to be in Nagoya with one of my agents, and he showed me this bowl.

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4 BY THE COURT: * * *

5 Q You had a conversation with the agent. After
6 that conversation what did you do?

7 A I went out to the factory and I was shown two
8 proof molds, they were hand copies of this. One was a
9 Florida design and the other one was this, both in the same
10 sort of shape.

11 Q When you say "this" you are referring to Plain-
12 tiff's Exhibit 3?

13 A Referring to Exhibit 3.

14 BY MR. PATTON:

15 Q Yes?

16 A At that time I inquired as to the cost, and --

17 Q Well, you learned that there was another item?

18 A Yes.

19 Q Did there come a time when you learned whether
20 or not Plaintiff's Exhibit 3 or copies of it were marketed
21 in the New York City area?

22 A Yes. We saw the bowl later on in stores that had
23 previously purchased our bowl.

24 Q Did you personally see them?

25 A Yes, I did.

1 2
2 BY THE COURT:

3 Q Can you tell us approximately when that was that
4 you saw them?

5 * * *

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10 * * *
11 A (Continuing) Anyway, I went in to see the bowl,
12 Exhibit 3, and I noticed the similarity to our bowl. So
13 that is how I knew about it.

14 BY MR. PATTON:

15 Q Now referring again to the Arrow bowl, Plaintiff's
16 Exhibit 2, has that bowl been marketed continuously by
17 Arrow since 1959?

18 A Yes.

19 Q In the New York City area?

20 A Well, I know it has been continuously marketed
21 as long as I am there, which is 1961.

22 However, I did work for another company which
23 was a competitor of Arrow's, so I do have knowledge of a
24 couple of years prior to that that they were marketing the
25 item, having seen it in the stores.

* * *

BY MR. PATTON:

Q Does Arrow have an art department?

A Yes, we do.

Q What does the art department do?

A They make original art work for items that we
either manufacture or import. We have two full-time
artists in our factory at all times.

* * *

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BY MR. PATTON:

Q Do you know who designed Plaintiff's Exhibit 2?

A Yes, I do.

Q Who?

A Mr. Alex Zinn, former president and owner of Arrow Novelty Company.

MR. PATTON: That is all I wanted to establish on that.

Q Now, Mr. Brown, do you know a man named Aaron Slabodsky?

A I do.

Q Who is he?

A He was the former domestic buyer for Enco and the New York City salesman for Enco.

Q Did you ever have any conversation with Aaron Slabodsky about Plaintiff's Exhibit 2, the Arrow bowl?

MR. COBRIN: May we have a time reference on this, your Honor?

THE COURT: First, did you have any, and then, when?

Q Did you ever have any conversation with Aaron Slabodsky concerning Plaintiff's Exhibit 2, the Arrow bowl?

A I did.

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Q When?

A In June and July of this past year.

MR. COBRIN: Your Honor, I move to strike all this testimony about any conversation he may have had with Mr. Slabodsky in June of this year. Mr. Slabodsky was no longer in our employ; we had already commenced selling our accused item, and this is entirely irrelevant.

Q June or July of 1974?

A 1973, excuse me, of last year.

MR. COBRIN: Your Honor --

MR. PATTON: It is my understanding the witness misspoke.

MR. COBRIN: Your Honor, may I get a ruling on my motion?

THE COURT: He is just trying to ascertain --

MR. PATTON: I would like to lay a foundation.

THE COURT: We certainly can't tell at this point where Mr. Slabodsky was or anything like that. We have this witness who is telling us of a conversation.

MR. COBRIN: Your Honor, at this time our tray had already been on the market.

THE COURT: Overruled.

Let me find out what we have here. This is a non-jury case.

1 lp
2 All right, you have to make your objections and
3 I have to make my rulings.

4 Proceed.

5 BY MR. PATTON:

6 Q Let us establish precisely, again, when was
7 this conversation?

8 A June, July of last year, of 1973.

9 Q At that time do you know by whom Mr. Slabodsky
10 was employed?

11 A He was employed by Enco.

12 Q In what capacity, to your knowledge?

13 A To my knowledge he was the domestic buyer of
14 souvenirs and the New York City salesman.

15 Q What did Mr. Slabodsky say to you and what did
16 you say to him on that occasion?

17 MR. COBRIN: I object to his asking what Mr.
18 Slabodsky said to him as being hearsay.

19 MR. PATTON: Your Honor, if I may --

20 THE COURT: I will permit it.

21 A Mr. Slabodsky came to me for a job. At that
22 time he seemed --

23 Q I want to be sure -- I want to know what he said
24 to you and what you said to him and not characterizations
25 or anything else.

1
2 A He said to me, "I have been trying for many years
3 through Bob Stevens of Multi-Products to knock off your
4 bowl, but it doesn't make any difference now."

5 And I said, "Why?"

6 He said, "Because we have already got it knocked
7 off in Japan."

8 MR. COBRIN: I move to strike that last state-
9 ment as being rank hearsay, your Honor.

10 THE COURT: I will permit it.
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19 * * *
20 CROSS EXAMINATION

21 BY MR. COBRIN:

22 Q Mr. Brown, do you have any personal knowledge of
23 what was deposited with the Copyright Office in order to
24 obtain Plaintiff's Exhibit 1, which is the copyright
25 certificate?

lp

Brown-cross

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No.

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BY MR. COBRIN:

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Q Isn't it a fact that you have no personal

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knowledge as to whether there were any changes in the bowl

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from 1955 until 1959 when it was deposited with the Copyright

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Office?

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A I believe from 1960, because I used to go into

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the stores as a competitor of Arrow's and saw this bowl,

21

so I know from 1960 onward.

22

Q I am talking now from 1955 to 1960. Can't you

23

answer the question I have asked you?

24

A From 1955 to 1960 I would have no knowledge.

25

Q Do you know who took care of obtaining Plain-

lp

Brown-cross

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tiff's Exhibit 1, which is the copyright certificate in
suit?

A What was his name?

Q Do you know the lawyer?

A Well, if you would tell me his name I might know.

Q I am asking you, Mr. Brown, if you know the
lawyer?

A I don't understand the question.

Q Well, I will rephrase it for you, Mr. Brown:
Do you know the person who on behalf of the
plaintiff obtained the copyright certificate in suit?

BY THE COURT:

Q First of all, do you know who it was?

A No, I do not know who it was, I am sorry, your
Honor.

BY MR. COBRIN:

Q Isn't it a fact that you have no idea whatsoever
about any of the circumstances of obtaining the copyright
certificate in suit, Plaintiff's Exhibit 1?

A I only know --

Q I am limiting myself now to direct personal
knowledge.

A I don't understand your question, that is the
problem. Would you please rephrase it?

MR. COBRIN: Can I hear the question back?

THE COURT: He says he does not understand it.

BY MR. COBRIN:

Q Isn't it a fact, Mr. Brown, that you have no knowledge whatsoever of the circumstances surrounding plaintiff obtaining this copyright certificate?

MR. PATTON: Your Honor, the question is changed a little bit.

THE COURT: That is all right, he said he could not understand the question so he is rephrasing it. He asked him to rephrase it.

A The knowledge that I have --

Q I am talking about direct personal knowledge.

A I was not with the company at 1955.

Q I think it requires a yes or no answer.

Isn't it a fact that you have no personal knowledge about the circumstances surrounding the obtaining of Plaintiff's Exhibit 1, the copyright certificate in suit?

A Yes.

Q You have no personal knowledge about it whatsoever?

A At that time.

Q At that time, referring to the time it was obtained?

lp

Brown-cross

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2 A That is correct.

3 MR. COBRIN: Your Honor, I would like to renew
4 my motion now to strike Exhibit 2. There has been no con-
5 nection whatsoever between the exhibit and the work that
6 was deposited with the Copyright Office. We are off
7 on a tangent --

8 THE COURT: The plaintiff has not rested yet.

9 MR. PATTON: Another witness is forthcoming.

10 THE COURT: Your motion is denied at this time.
11 You may have a valid point, but at this time I am going to
12 deny your motion.

13 You must remember that this is a non-jury case --

14 MR. COBRIN: Well, your Honor --

15 THE COURT: -- and a lot of evidence and
16 testimony is taken subject to connection. In the event
17 it is connected, fine; if it is not it is not going to be
18 considered by the Court.

19 Let's proceed.

20 BY MR. COBRIN:

21 Q Mr. Brown, you mentioned that Mr. Slabodsky came
22 to see you, is that correct?

23 A That is correct.

24 Q When was this?

25 A June of 1973.

lp

Brown-cross

33

Q Did Mr. Slabodsky come to see you with respect to obtaining employment?

A He did.

Q Don't you think he tried to ingratiate himself with you in order to obtain employment and made statements that you would find favorable?

A No, I don't think so. I don't think he was that type of an individual.

Q Did you speak with Mr. Slabodsky about the present lawsuit?

A No.

MR. PATTON: When?

THE COURT: He says no.

A No, I have not had any contact --

Q Am I correct that you never made any attempt to get Mr. Slabodsky to testify in this case?

A No, I did not.

Q Is Mr. Slabodsky presently working out of the New York City area?

A He works one of Enco's competitors.

Q What is the name of the competitor?

A I think they recently changed their name.

Q Where are they located?

A They are in the Bronx.

lp

Brown-cross

34

Q So it is fair to say that Mr. Slabodsky works out of New York City presently?

A He does.

MR. COBRIN: I have no further questions, your Honor.

THE COURT: Anything further?

MR. PATTON: No, sir.

THE COURT: All right, you may step down.

(Witness excused.)

THE COURT: Next witness.

MR. PATTON: Your Honor, I regret to inform the Court that the next four witnesses are on paper in depositions.

THE COURT: Yes?

MR. PATTON: And with your permission Mr. Seymour will be the star witness and will read the answers.

This is Mr. Steinberg's deposition.

THE COURT: Do you have any extra copy?

MR. PATTON: I have two copies. I have a list of the excerpts to be read.

MR. COBRIN: This is Mr. Steinberg?

MR. PATTON: Yes.

MR. COBRIN: I think I have an extra copy.

THE COURT: Do you have a list of the excerpts to be read?

MR. PATTON: Yes (handing).

Now I would like to say on a very minor point, your Honor and Mr. Cobrin, last night there were a couple of changes on the list I supplied to you of the excerpts, but very minor.

THE COURT: All right, let's proceed.

(The following excerpts in Mr. Steinberg's deposition were read.)

"D A N I E L S T E I N B E R G, called as a witness herein, having been first been duly sworn by a Notary Public of the State of New York, testified as follows:

"EXAMINATION BY MR. PATTON:

"Q What is your name?

"A Daniel Steinberg.

"Q Where do you reside?

"A 43-44 Kissena Boulevard, Flushing, New York.

"Q Mr. Steinberg, I take it you are in the sales end of Enco National?

"A That is correct.

"Q What is your exact title?

"A Vice president of sales.

"Q How long have you been in that position?

"A A little over two years.

lp

"Steinberg

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2 "Q Were you in Enco prior to becoming vice-
3 president in sales?

4 "A Yes.

5 "Q In what capacity were you with Enco prior to
6 that time?

7 "A As a salesman.

8 "Q What area, basically? What geographical area?

9 "A I worked all areas, I was a house salesman
10 covering all areas.

11 "Q There was no particular territory assigned to
12 you at that time?

13 "A No.

14 "Q I take it, as a vice-president of sales, that
15 you are in charge of the sales efforts of Enco?

16 "A Yes.

17 "Q And that is a nationwide sales force?

18 "A Yes, coast to coast.

19 "Q Is there a separate sales department or
20 division for the New York City area?

21 "A No.

22 "Q Are there particular salesmen assigned to the
23 New York City area?

24 "A One man is assigned to that area.

25 "Q Who is that now?

lp

"Steinberg

37

"A Lee Weissfeld.

"Q Could you just very generally describe for me what your functions are as vice-president in sales?

"A I am responsible for sales efforts, sales reports, and I coordinate trade shows for our national sales force.

"Q Do you in that position involve yourself personally with customers of Enco?

"A Yes.

"Q What kind of dealings do you have with Enco customers?

"A I don't think I understand what you mean.

"Q I'm sorry. I can understand why you wouldn't understand.

"I take it you have a continuing contact with Enco customers; is that right?

"A No, not continuing in the sense that you might mean it; sporadic occasional contacts with specific accounts.

"Q Are there particular accounts that you are in contact with more so than others, or do you get in touch with all kinds of customers?

"A Generally, major accounts, scattered throughout the country.

lp

"Steinberg

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2 "Q In dealing with customers, do you talk about
3 the kinds of items they like to see in the stores?

4 "A Generally, no.

5 "Q Generally, I take it you --

6 "A Let me rephrase this.

7 "Q Sure, go ahead.

8 "A If I am working with a specific account, I will
9 concern myself with those items that we have available
10 for them, rather than new concepts.

11 "Q Do you discuss with customers the kinds of items
12 that are moving and the kinds of items that aren't moving?

13 "A Yes.

14 "Q Do you discuss with customers the kinds of
15 items marketed by your competitors that are moving or not
16 moving?

17 "A No. Generally, they are confined to our own
18 items that are salable or the lack of salability.

19 "Q Then within your sales staff, internally, do you
20 discuss items of competitors that are moving or not moving?

21 "A At sales meetings only.

22 "Q I take it then that at the sales meetings you
23 would discuss if a particular competitor and particular
24 complete line or item is moving particularly well as opposed
25 to perhaps a line that you carry?

lp

"Steinberg

39

"A Yes, we would discuss this.

"Q Arrow Novelty is a competitor of yours, I take it, at least in certain lines of items?

"A It's a matter of opinion. Arrow per se is not truly a competitor of ours since our coverage is nationwide and theirs is much more limited. They are confined to specific areas, where we are covering all 48 continental states.

"Q So certain items on certain lines, though, I take it that you do compete with Arrow in certain parts of the country?

"A Yes.

"Q Do you compete with them in the New York City area, in certain lines?

"A Arrow is not a factor in New York City.

"Q You mean they are not a major material factor?

"A Right.

"Q You do know that they market in New York City?

"A Yes.

"Q And they market souvenir and novelty items?

"A Yes, sir.

"Q I guess what you are saying then is that compared to Enco, Arrow is not a major factor?

"A I would put it this way: In New York City Enco

lp

"Steinberg

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is an innovator, and a leader. I don't know if we control major portions of the souvenir business in this city, but I would say, on a scale from one to 10, we probably would register about seven. We control about 70 per cent of the souvenir business within the City of New York.

"Q Do you have any knowledge of the relevant size of Arrow in the New York market on a scale from one to 10?

"A Probably about .5.

"Q So you have roughly 70 per cent of the market and they have roughly 5 per cent of the market?

"A Right.

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"Q As a salesman now and as the head salesman now,
I take it you do try to keep abreast of the marketing
efforts of Specialty Products and Arrow Novelty?

lp

"Steinberg

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1 "A Only if our overall sales should fall off.
2
3 In dealing in specifics, it doesn't generally fall down
4 to items in the line or lack of items; it generally is
5 determined by lack of efforts on the part of the sales
6 force. Then if our sales -- and, of course, they are
7 kept on a monthly, weekly or yearly basis, and barring
8 any unforeseen calamity situation -- if our sales figures
9 should drop dramatically, then I would make it my business
10 to find out why. The salesmen in the field, if they feel
11 they need additional ammunition, items, pricings, or an
12 entree into an account that they previously have not been
13 able to sell, then they will come to me.

14 "Q Now I'm only talking about New York areas, so
15 let's forget about any other area.

16 "Do your salesmen or in particular, Mr. Weissfeld,
17 have occasion from time to time to come to you and mention
18 to you competing items in the stores handled by other
19 companies, such as Arrow and Specialty Products?

20 "A Yes.

21 "Q So you have occasion from time to time with
22 internal salesmen to discuss Arrow Novelty products?

23 "A No. We have had occasion to discuss competitive
24 items. Very often we do not know the source, but we have
25 occasion to discuss items that have made an impact on the

lp

"Steinberg

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2 local market. When I say local, we are limited to say
3 59th Street to 14th Street and river to river.

4 "Q That is basically the local market?

5 "A Yes, outside of the Statue of Liberty, which
6 is, of course, separated by the bay. The bulk of it is
7 Midtown Manhattan.

8 "Q Is that because the tourists buy their souvenirs
9 in that area?

10 "A It's not where they buy them; that is where their
11 activities are limited to."
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"Q Do you know or can you recall who the salesmen were since 1963 who have covered the New York City area, if you can recall?

"A There were two individuals, Victor Kersten, who is now self-employed, and Aaron Slabodsky, who is no longer with the company.

"Q When did Mr. Slabodsky leave?

"A I would say almost a year ago, it will be a year probably in August.

"Q Do you recall what period of time that Mr. Slabodsky was a salesman for this area?

"A Well, this area was split. We had both of them, Victor and Aaron, covering various parts or various customers in the City; Aaron probably for the last 10 years and Victor for six years, approximately.

"Q I'm sorry. You will have to tell me again when

lp

"Steinberg

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1 lp "Steinberg 45
2 did Mr. Slabodsky first become a salesman?

3 "A I would say about 1962, or '63, for New York
4 City.

5 "Q Until when, again?

6 "A Until August of '73.

7 "Q So that Mr. Kersten was --

8 "A He was working at the same time, but the terri-
9 tory is divided into two different categories.

10 "Q So for about a year then Mr. Slabodsky would
11 be under you when you became vice-president in charge of
12 sales?

13 "A That is correct.

14 "Q Did you ever have any conversation with Mr.
15 Slabodsky during that year, roughly, about New York City
16 souvenir trays?

17 "A No."

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lp

"Steinberg

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MR. PATTON: Skipping to page 27, line 11.

"Q I take it from what you said previously that between 1963 and today, you have no knowledge that Plaintiff's Exhibit 3 was on the market in New York City?

"A I have never seen the actual item until today."

MR. PATTON: Is it understood that Plaintiff's Deposition Exhibit 3 is Plaintiff's Trial Exhibit 2, the Arrow bowl?

lp

"Steinberg

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MR. COBRIN: Yes.

(Continuing reading) "Q But you did know about it?

"A I know of a tray, a redwood tray, but that's all I know about it.

"Q How long have you known about it?

"A I would say six or seven years, but not necessarily in New York. There are other trays of a similar nature that are marketed throughout the country.

"Q Have you seen others of a similar nature?

"A Oh, yes.

"Q Any by Arrow Novelty manufacture?

"A Do they copyright all of their products?

"Q Pardon me? I don't know.

"A Well, this one, the one I have seen, had no such marking on the back.

"Q So you really don't know who makes them or who markets them?

"A I don't know.

"Q Do you have any personal knowledge of whether or not anyone else at Enco had prior to March of 1973 known about or seen Plaintiff's Exhibit 3?

"A I don't know."

MR. PATTON: Again referring to Plaintiff's

lp

"Steinberg

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1
2 Trial Exhibit 2.

3 "Q Again, from what you have told me already,
4 I take it that as a matter of course Enco salesmen in
5 this area would visit retail establishments?

6 "A When you say 'this area,' do you mean New York?

7 "Q I mean New York.

8 "A Oh, yes.

9 "Q Those retail establishments, I take it handled
10 lines of souvenirs and novelties of items of competitors of
11 yours?

12 "A Yes.

13 "Q Does Enco do business with F.W. Woolworth &
14 Company?

15 "A Yes.

16 "Q Are they a substantial customer in this area?

17 "Mr.Cobrin: What do you mean when you say
18 this area?

19 "Mr. Patton: Between 59th Street and the Statue
20 of Liberty.

21 "A You are confining it to New York City?

22 "Q Yes.

23 "A Yes, a fairly substantial account.

24 "Q Why did Mr. Slabodsky leave?

25 "A Earlier in the conversation you asked me about

lp

"Steinberg

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2 what happens, do I go out into the field to the men to
3 find out what they are doing or whether they are selling.
4 I answered and I told you not unless their sales dropped
5 off, and Mr. Slabodsky was involved in two areas and doing
6 neither one satisfactorily. The most important area of
7 his was sales which slipped considerably, and this was the
8 reason for his separation from Enco.

9 "Q What other area was he involved in?

10 "A Domestic buying.

11 "Q Do you know roughly when his sales started falling
12 off?

13 "A Well, allowing for the fact that he has been gone
14 almost a year, I would say two years ago."

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"DIRECT EXAMINATION

19

BY MR. PATTON:

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"Q Mr. Stevens, you are the president of Multi-
Products?

21

22

"A Yes, I am.

23

"Q Is the correct name Multi-Products?

24

"A Multi-Products, Inc.

25

"Q How long have you been president?

1p

"Stevens

57

2 "A Since about 1968.

3 "Q And how long have you been with Multi-Products?

4 "A Since March of 1965.

5 "Q Just to set the stage, would you des-
6 cribe in general terms the business of Multi-Products?

7 "A Well, we are primarily simulators of wood in
8 molded material. We manufacture novelties and giftware
9 items for the souvenir market and the gift store-type
10 operations.

11 "Q And in that connection, do you do business with
12 the plaintiff in this case, Arrow Novelty Co.?

13 "A Yes, we do.

14 "Q And generally, to set the stage, would you
15 describe what business you do with Arrow?

16 "A We manufacture various souvenir bowls, trays,
17 and plaques on an exclusive basis for Arrow, and also
18 sell them on our proprietary line, which they market through
19 the country for us.

20 "Q This item that I am handing you has been marked
21 as Plaintiff's Exhibit No. 3 already in this case, and for
22 the record, it is the Arrow Novelty Co. New York City bowl."

23 MR. PATTON: Skipping the next two lines:

24 "Q Do you recognize that?

25 "A Yes, this is one which we manufactured.

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"Q And this is one which you manufacture for Arrow, is that correct?

"Mr. Cobrin: I object to the form of the question. You are leading the witness.

"By Mr. Patton:

"Q Well, I will restate it.

"Do you manufacture this for yourself or Arrow?

"A For Arrow Novelty exclusively.

"Q Now, did you ever know a man by the name of Aaron Slabodsky?

"A Yes.

"Q When did you first meet or talk with Mr. Slabodsky?

"A I first talked with him back in about 1971 when he was with Enco.

"Q Can you approximate when in 1971?

"A It was the early Fall. He called me on the telephone and introduced himself.

"Q Let's get into what that conversation was. What did he say to you and what did you say to him?"

MR. COBRIN: I object, your Honor. He is now asking the witness to relate a conversation had with the witness by a third party. This is the rankest form of hearsay.

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2 THE COURT: The objection is noted. I will
3 take it.

4 MR. PATTON: For the record, without being
5 argumentative, your Honor, I do not offer this necessarily
6 for the truth of what is said but the fact that it was
7 said.

8 (Continuing reading) "By The Witness:

9 "A He called me on the telephone and introduced
10 himself as a representative of Enco, who is owned by a
11 company known as Universal-Marion, I believe, and he was
12 interested in our manufacturing specifically a New York
13 City Tray for Enco. And at that time, I told him that I
14 had, had numerous inquiries over the years from many
15 souvenir jobbers throughout the country and souvenir
16 representatives; that our arrangement with these companies
17 that we make a specific item for, is that we will not
18 manufacture a similar competing item for someone else, and
19 the reason being is that we have an investment in the tool
20 as well as the customer who we sell it to. We each
21 pay half, and there would be no sense in selling them
22 competing items to someone else, because we just spend our
23 own sales and double our investment.

24 "By Mr. Patton:

25 "Q Did he say anything in response to that?"

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2 MR. COBRIN: Your Honor, I object on the ground
3 that it is calling for hearsay.

4 THE COURT: He is offering this merely for the
5 fact that there was a conversation between Mr. Slabodsky
6 and the witness whose deposition is taken.

7 Is that correct?

8 MR. PATTON: Yes.

9 MR. COBRIN: What relevance does it have?

10 MR. PATTON: Knowledge by Enco.

11 THE COURT: We will take it.

12 (Reading continued) "Q Did he say anything in
13 response to that?

14 "A Basically, what he told me was that Enco
15 Company could do a much better job on the item than
16 Arrow Novelty, and that I was stupid to sell it to Arrow
17 because he could sell -- I don't know how much he mentioned,
18 but thousands more than Arrow ever did, and at that time,
19 I offered to make him either a memo-pad for New York City
20 or a napkin holder, which we do not make for Arrow; but
21 he was not interested in that at all. He asked me to
22 send him catalogs and price lists and I thought he might
23 sell regular items, but he never did.

24 "By Mr. Patton:

25 "Q Did he say or indicate whether or not he was

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aware of Arrow's Tray?"

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MR. COBRIN: I object again, your Honor.

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THE COURT: Overruled.

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"A To the best of my knowledge, he didn't really do

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anything but assure me that he knew about the Arrow Tray,

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because he said I was stupid to sell it to Arrow. I

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should sell it to Enco.

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"Q Was there any other conversation at that time

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that you remember?"

11

MR. PATTON: I assume there is an objection?

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MR. COBRIN: Yes.

13

THE COURT: He is objecting to the entire thing.

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MR. PATTON: Basically, that's the gist of

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the whole thing. He called me twice that Fall in regard

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to the same thing. I know that.

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"Q Both conversations had roughly the same gist to

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them?

19

"A Right.

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"Q Thereafter, did you have any other communication

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with him by telephone, personally or by letter?

22

"A To the best of my knowledge, no, not while he

23

was at Enco. I did later when he left."

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MR. PATTON: I have designated other portions

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of his deposition, but it occurs to me that I am satisfied

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where I am, and I will stop there.

MR. COBRIN: Other than my objections we have
nothing to designate.

THE COURT: All right.

* * *

J O H N P A S S E L A, called as a witness on behalf
of the plaintiff, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. PATTON:

Q Mr. Passela, by whom are you employed?

A Arrow Novelty.

Q How long have you been employed with Arrow
Novelty Company?

A 50 years.

Q Since about when?

A 1924.

Q What is your present position with Arrow?

A I am assistant to Ritchie and Mr. Brown.

Q You will have to describe Ritchie. Who is
Ritchie, just for the record.

A I beg pardon?

THE COURT: He wants to know who Ritchie is.

THE WITNESS: He is seated right there (indicating).

THE COURT: What position does he hold with the
company?

THE WITNESS: He is assistant to Mr. Brown.

Q And you are an assistant to Mr. Brown?

A Both of us.

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Q Between, roughly, 1955 and 1960 were you with Arrow at that time?

A I was.

Q What was your position with Arrow at that time?

A I was a department head.

Q Department manager?

A Yes.

Q Have you or have you not ever had any sales capacity?

A I was a part-time salesman, too. I covered the City.

Q Which city?

A New York City.

Q Do you recognize Plaintiff's Exhibit 2?

A This bowl? This is Arrow Novelty's bowl. That is the design of Arrow Novelty.

THE COURT: I know it is difficult, but you will have to try to speak up.

Q I am now going to show you Plaintiff's Exhibit 1, and this is in evidence, a certificate of registration of a claim of copyright.

I refer you to Item 6, "Date of Publication, October 12, 1955."

On the back I refer you to "Application

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2 Received, February 29, 1960."

3 Now, do you know of your own personal knowledge
4 whether Plaintiff's Exhibit 2 is the bowl a copy of which
5 was deposited with the Registrar of Copyrights?

6 A Well, Mr. Litzenberger who did the designing --
7 he passed away -- he done all the designing, and I worked
8 for Mr. Litzenberger on the designing, and we paid for the
9 molds with Multi-Products --

10 Q Do you know that this is the bowl a copy of which
11 was deposited with the Copyright Office?

12 A That is the definite design of Arrow Novelty.
13 This is Arrow Novelty design.

14 Q Is that the one a copy of which was deposited
15 with the Copyright Office?

16 A Well, that -- Mr. Litzenberger handled that.

17 Q Has there ever been any other bowl?

18 A No other bowl outside of this one. I have been
19 selling this in this City ever since we manufactured it.

20 Q You notice the date of publication is October,
21 1955. Since that time has there ever been any other New
22 York City bowl, a mold for any other bowl than Plaintiff's
23 Exhibit 1?

24 A We had one in an octagon shape that was ours,
25 and we discontinued, but this is the one we stuck with

because it has been the best seller of all.

Q Has this been marketed since 1955?

A Well --

Q Just yes or no.

A Yes.

THE COURT: And prior thereto? Prior to 1955?

Q Has the mold of this ever changed?

A Never been changed.

Q Since --

A Ever since we started with it that mold has been the same, we haven't changed the design.

Q I want to ask you the same question again -- and I know I am repeating myself -- but I have shown you this bowl, Plaintiff's Exhibit 2, and I have shown you the certificate of copyright registration, Plaintiff's Exhibit 1.

Is this the bowl that was deposited with the Copyright Office?

A That is right, the only one we ever had.

Q Do you know that of your own personal knowledge?

A Yes.

MR. PATTON: Thank you. No further questions.

CROSS EXAMINATION

BY MR. COBRIN:

Q You testified -- and correct me if I am wrong --

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2 that you did not know what was deposited with the Copyright
3 Office to obtain Plaintiff's Exhibit 1, is that correct?

4 A That is the only bowl --

5 Q Can you answer my question, please? Did you
6 know what was mailed or deposited with the Copyright
7 Office to obtain Plaintiff's Exhibit 1?

8 A I am pretty sure Mr. Litzenberger --

9 Q Do you have personal knowledge of what it was?

10 A I have no personal knowledge; I know that is the
11 only bowl we ever had.

12 Q Could you answer the question. You don't have
13 personal knowledge of what was deposited in the Copyright
14 Office to obtain the certificate which comprises Plaintiff's
15 Exhibit 1 in evidence, is that correct?

16 A In all the years that I --

17 Q Could you answer the question?

18 A I just told you I don't.

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REDIRECT EXAMINATION

BY MR. PATTON:

Q Where is Mr. Litzengerger?

A He passed away.
* * *

* * *

MR. COBRIN: The first motion I would like to make is, I move to strike Plaintiff's Exhibit 2 which was admitted subject to connection. There has been no connection showing what was precisely deposited in the Copyright Office.

Now, we don't know whether this is the item which the Copyright Office granted protection on. Plaintiff has chosen not to prove it, and this item is absolutely

1
2 irrelevant without showing some connection.

3 The Copyright Office issues the certificate
4 based on the applicant depositing two identical copies
5 and the certificate covers what they deposited. There
6 has been no proof here as to what was deposited with the
7 Copyright Office.

8 THE COURT: Why can't that be ascertained?
9 If it is just a technicality why can't it be ascertained
10 other than just a certificate and some other item coming
11 in? Granted you may have some difficulty where people are
12 dead --

13 MR. PATTON: I confess I really don't know what
14 law --

15 THE COURT: Can't you get a certificate out of
16 the Copyright Office that this is the same? I should think
17 they would do those things; like any other governmental
18 document, if that is so, then it becomes prima facie evi-
19 dence.

20 Now since the issue has been raised -- circum-
21 stantially it may be the same item, but where it is subject
22 to absolute proof, why do we need to have this as a problem?

23 MR. PATTON: I was not aware, I confess, that
24 it was a problem.

25 THE COURT: Well, he has raised the issue.

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It may be a technical thing, but he has got the right to raise any issue that comes up.

MR. PATTON: Frankly I was not aware that there was any additional legal burden on me other than first putting in the certificate which describes the ball, its size, its weight --

MR. COBRIN: I don't believe it describes the size.

MR. PATTON: It describes the size and weight. There has been no other bowl.

THE COURT: Just a moment.

Do we have a ruler in the courtroom?

THE CLERK: No, sir.

THE COURT: Can you tell me whether these are the dimensions specified in here, 10-1/2 inches by 11-3/4 inches, and does it weigh 1 pound 2 ounces?

MR. PATTON: I can represent that it does, your Honor.

THE COURT: All right, I will deny the motion on that ground.

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DANIEL STEINBERG, called as a witness
on behalf of the defendant, being first duly
sworn, testified as follows:

DIRECT EXAMINATION

BY MR. COBRIN:

Q Mr. Steinberg, are you currently employed?

A Yes.

Q Whom are you employed by?

A Enco National Corporation.

Q What is your position with Enco National Corpora-
tion?

A Vice-president of sales.

Q What is the business of Enco?

A Distribution of souvenir and novelty items.

Q What are your duties as vice-president?

A Overseas salesman in the field, prepare trade
shows and supervise all of the men in the field.

Q How long have you been with Enco?

A Almost 12 years.

Q And in what capacities?

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2 A Primarily as a salesman.

3 Q Mr. Steinberg, I hand you Plaintiff's Exhibit 4
4 in evidence and ask you to examine it. Have you ever seen
5 that tray before today?

6 A Yes.

7 Q When did you first see it?

8 A The end of January of 1973.

9 Q And where did you see it?

10 A Circus Circus Hotel in Las Vegas.

11 Q When you saw the tray at the Circus Circus Hotel
12 in Las Vegas did you check it for copyright and trade-
13 marks?

14 A Yes.

15 Q Did you find any?

16 A None.

17 Q Did you purchase the tray?

18 A Yes, I did.

19 Q What was your purpose in purchasing it?

20 A Basically it is an ideal souvenir item; it
21 contains all of the salient features that one who is a tourist
22 in Las Vegas would be able to incorporate into one item,
23 and it would lend itself to other areas throughout the United
24 States.

25 Q Did you ever discuss this tray with anybody in

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Enco?

A Yes.

Q Whom did you discuss it with?

A Mr. Herb Bendell.

Q Who is Herb Bendell?

A He is our overseas buyer.

Q Why did you discuss the tray with Mr. Bendell?

A All products of this nature in overseas purchases would go through Mr. Bendell.

Q When was this discussion with Mr. Bendell?

A Probably some time in February or March of 1973.

Q Did you discuss with Mr. Bendell how the Las Vegas tray, Plaintiff's Exhibit 4, could be used?

A Oh, yes.

Q What did you discuss?

A Such areas as Mount Rushmore, Yellowstone National Park, Pike's Peak, various points of interest to tourists throughout the United States.

Q Did you discuss with Mr. Bendell as to featuring the landmarks for a particular point of interest on a tray for that particular locale?

A Yes.

Q Did you discuss with Mr. Bendell a New York City

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2 tray?

3 A Yes.

4 Q Was a conclusion reached with respect to the
5 manufacture of the New York City tray?

6 A We decided that we would go ahead with a tray of
7 this nature for New York City.

8 Q Did you discuss with Mr. Bendell at any time what-
9 soever prior to this lawsuit an Arrow tray which depicted
10 scenes of New York City?

11 A No.

12 Q Did you know of an Arrow tray which depicted
13 scenes of New York City prior to this lawsuit?

14 A No.

15 Q Did you ever see an Arrow tray which depicted
16 scenes of New York City prior to this lawsuit?

17 A No.

18 Q Do you know an Aaron Slabodsky?

19 A Yes.

20 Q Did you ever at any time whatsoever discuss with
21 Mr. Slabodsky an Arrow tray which depicted scenes of New
22 York City?

23 A No.

24 Q Did you ever at any time whatsoever discuss with
25 Mr. Slabodsky the Enco accused tray, and by that I am

1 lp Steinberg-direct

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2 referring to Plaintiff's Exhibit 3?

3 A Which is?

4 Q This tray here which I hand you.

5 THE WITNESS: Mr. Cobrin, would you repeat that
6 last question?

7 Q Did you ever discuss at any time whatsoever with
8 Mr. Slabodsky the design of the tray which you now hold,
9 Plaintiff's Exhibit 3?

10 A No.

11 Q Did you ever discuss with Mr. Slabodsky in any
12 manner whatsoever the manufacture of the tray which you
13 now hold, Plaintiff's Exhibit 3?

14 A No.

15 Q Did you ever discuss in any manner whatsoever
16 with Mr. Slabodsky the development of the tray which you
17 now have before you, Plaintiff's Exhibit 3?

18 A No.

19 Q Did Mr. Slabodsky have anything to do with the
20 design, development or manufacture of Plaintiff's Exhibit 3
21 which you now have before you?

22 A Not as far as I know.

23 Q I now hand you Plaintiff's Exhibit 2, which is
24 the Arrow tray. When did you first learn about that tray?

25 A At the beginning of the suit.

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Q Was Mr. Slabodsky discharged from Enco's employment?

A Yes.

Q When would that be?

A August of 1973.

MR. COBRIN: That is all, your Honor.

CROSS EXAMINATION

BY MR. PATTON:

Q Mr. Steinberg, how many times, roughly, would you say you visited New York City retail stores, customers of Enco in the 12 years you have been there?

A Maybe a half-dozen.

Q A half-dozen times?

A Yes.

Q Do you know whether or not other salesmen responsible for this area visited New York City retail establishments?

A Enco salesmen?

Q Yes, Enco salesmen.

A Oh, yes.

Q Before you became vice-president were you responsible for New York City sales?

A No.

Q That was Mr. Slabodsky, I take it?

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2 A Yes.

3 Q And also another gentleman whose name I forget?

4 A Mr. Kersten.

5 Q Mr. Kersten?

6 A Yes. * * *

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Q Mr. Steinberg, have you among other stores
visited F.W. Woolworth & Company?

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2 A Yes.

3 Q Have you from time to time seen competitors'
4 items in the stock at Woolworth's?

5 A Yes.

6 Q Have you visited other companies such as Kresge's
7 and other companies such as that?

8 A Most of the vendors of our merchandise I have
9 visited at one time or another.

10 Q And have you seen in these stores items marketed
11 by competitors?

12 A Yes, various items.

13 Q Souvenir items?

14 A Yes.

11 15 Q I take it your visiting of those stores goes
16 back over the 12 years of your employment, is that so?

17 A From time to time, yes.

18 Q And yet you maintain that you never saw the
19 Arrow tray, Plaintiff's Exhibit 2?

20 A Never seen it.

21 Q Never heard of it?

22 A No.

23 Q In your deposition, Mr. Steinberg, taken on June
24 20 of this year at page 27, I will ask you if you were
25 asked these questions and if you gave these answers:

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2 that is all you know about it, you were referring to
3 several trays?

4 A Several different types of trays.

5 Q Now, when you saw the Las Vegas bowl in Las
6 Vegas, Plaintiff's Exhibit 4, did you ask around to find
7 out who made it?

8 A Yes, I did.

9 Q What did you discover?

10 A The buyer for the location where I had purchased
11 it could not remember exactly who he had purchased it from
12 except that it was a firm that was located on the West
13 Coast in the Los Angeles area.

14 Q Did he tell you the name of the firm?

15 A No.

16 Q Could that firm be called Amsco?

17 A No.

18 Q It could not?

19 A No.

20 Q Who was this who told you about this?

21 A This would be Mr. Sam Dvorak.

22 Q Of where?

23 A Of Circus Circus.

24 Q He told you about Plaintiff's Exhibit 4?

25 A Yes.

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2 that is all you know about it, you were referring to
3 several trays?

4 A Several different types of trays.

5 Q Now, when you saw the Las Vegas bowl in Las
6 Vegas, Plaintiff's Exhibit 4, did you ask around to find
7 out who made it?

8 A Yes, I did.

9 Q What did you discover?

10 A The buyer for the location where I had purchased
11 it could not remember exactly who he had purchased it from
12 except that it was a firm that was located on the West
13 Coast in the Los Angeles area.

14 Q Did he tell you the name of the firm?

15 A No.

16 Q Could that firm be called Amsco?

17 A No.

18 Q It could not?

19 A No.

20 Q Who was this who told you about this?

21 A This would be Mr. Sam Dvorak.

22 Q Of where?

23 A Of Circus Circus.

24 Q He told you about Plaintiff's Exhibit 4?

25 A Yes.

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2 Q And he never called to your attention Plaintiff's
3 Exhibit 5?

4 A Never.

5 Q Did he mention the name of Karol Western
6 Company?

7 A No.

8 Q As between you and Mr. Bendell, who first sug-
9 gested getting a New York City bowl?

10 A I don't know. It might have been mutual.

11 Q When you brought it back from Las Vegas was
12 it your intention to get a New York City bowl in particular?

13 A Not necessarily. It was brought back for other
14 areas, all areas.

15 Q Did you have in mind, perhaps, getting a Florida
16 bowl?

17 A Possibly.

18 Q What was it that attracted you to the Las Vegas
19 bowl? Did the shape draw its attention to you?

20 A Partially the shape; mostly the registration
21 of the details within the tray. The fact that it covered
22 all the points of interest to the tourists within Las Vegas,
23 and those it could not cover it spelled out on the border.

24 Q The brown color, was that attractive to you?

25 A Only as of secondary importance.

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2 Q It doesn't matter what color it is? It doesn't
3 really matter what shape it is?

4 A I would say no.

5 Q It does not matter what size it is, I suppose?

6 A Size, yes. If it was smaller you couldn't get
7 the details. If it was larger it would be too cumber-
8 some.

9 Q So you were limited to this exact surface, is
10 that it?

11 A No, I would say approximate size. It may have
12 been an inch smaller or an inch larger, but generally of
13 this size.

14 Q Now, prior to March of 1973 had Enco marketed
15 any souvenir ball of the same size, the same shape and the
16 same color as Plaintiff's Exhibit 3, which is your New York
17 City bowl?

18 A Yes.

19 Q Exactly the same size, shape and color?

20 A No, of general dimensions.

21 Q Well, what general dimensions?

22 A Roughly, 8 x 10 but not necessarily rectangular.
23 It could have been round but of a different material.

24 Q What kind of material?

25 A Paper mache.

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2 Q You manufactured that and you sold that in the
3 New York City area?

4 A No.

5 Q Where?

6 A Well, we made several: one for Mount Rushmore;
7 one for Yellowstone National Park.

8 Q It had a different shape?

9 A Slightly different shape.

10 Q Different size?

11 A Three-dimensional.

12 Q Same color?

13 A Yes.

14 Q Brown?

15 A Of a brownish cast.

16 Q Just brown, no reds or blues?

17 A No.

18 Q About how big was it compared to this, bigger
19 or smaller?

20 A I would say the same general size.

21 Q That is the only thing you manufactured of a
22 similar shape, size and color?

23 A To the best of my knowledge.

24 Q And it was not of New York City?

25 A No.

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2 Q Now, when you discussed with Mr. Bendell getting
3 a New York City bowl, was anybody else present at those
4 discussions?

5 A I think there were just the two of us.

6 Q Just the two of you?

7 A Yes.

8 Q No other salesman?

9 A No.

10 Q Is it possible that there were other salesmen
11 there?

12 A I would say there was an outside possibility,
13 but just barely.

14 Q But, certainly Mr. Slabodsky was not present?

15 A No.

16 Q You didn't think of asking him to discuss the
17 New York City bowl?

18 A No.

19 Q Prior to March of 1973 had you ever heard of
20 Multi-Products?

21 A Yes, vaguely.

22 Q Did you know what business they were in?

23 A Molded plastics.

24 Q Did it ever occur to you to have a domestic
25 supplier for your New York City bowl?

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A No.

Q Mr. Slabodsky was in charge of domestic buying,
wasn't he?

A No.

Q He was not?

A No.

Q Didn't he have something to do with domestic
buying?

A He was a re-buyer, a reorder buyer.

Q A reorder buyer?

A If I can distinguish --

Q Things that are already bought --

A That were already bought, he was authorized to
reorder.

Q You would have no personal knowledge, I take it,
of whether Mr. Slabodsky did or did not go to Multi-Products
in 1971 and seek a New York City bowl for Enco?

A No.

Q He never talked to you about that?

A No.

Q Would you state whether or not your New York City
sales between 1970 and 1971 declined?

MR. COBRIN: I object, your Honor. This is
entirely irrelevant.

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THE COURT: Yes.

MR. PATTON: I suggest, your Honor, that Mr. Steinberg said that whenever sales dropped he went out and looked into competitors' items and tried to see why other items were moving and theirs were not.

MR. COBRIN: Also, your Honor --

THE COURT: All right, I will reverse myself. Go ahead.

Q To your knowledge, of course.

A Did they decline?

Q Yes.

A Between 1970 and 1971?

Q Yes.

A I would say not appreciably, no.

Q But they did decline?

A Somewhat?

Q Somewhat?

A Yes.

Q Did you have discussions with New York City salesmen about the decline in sales?

A At that time I was not authorized to make any kind of judgment or decision.

Q You were not the vice-president at that time?

A That is correct.

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Q You were a salesman involved in other areas?

A Other areas.

Q So you would not know whether or not Enco salesmen in 1971 discussed a decline in New York City sales?

A No.

Q What about 1972? Was there a decline in sales?

A Yes.

Q Were you vice-president then?

A No.

Q So you didn't have any discussions about a decline in sales or the reasons for it?

A I was sales manager under different management and was unable to make any changes whatsoever.

Q Prior management was Mr. Louis Wolfson, is that correct?

A Yes.

Q And he sold it subsequently?

A Right.

Q What about 1973?

A In 1973, I believe it was April, under new management the continuing rate of decline of sales in New York City forced me to terminate Mr. Slabodsky.

Q You were vice-president at that time?

A Yes.

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Q When did you become vice-president?

A Shortly after April of 1973.

Q So shortly after you became vice-president you terminated Slabodsky because his sales declined?

A Declined is probably a poor word.

Q Fell off?

A Dropped.

Q Dropped?

A Yes.

Q Significantly?

A Highly significantly.

Q Did you talk to him why sales were dropping?

A Yes.

Q Did you talk to him about why competitive items were succeeding and his were not?

A No.

Q You did not ask him whether his sales were falling off because competitors' sales were increasing?

A If I may I can tell you why the sales were falling off.

Q Yes.

A Lack of effort.

Q Lack of effort?

A Yes.

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Steinberg-cross

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Q On Mr. Slabodsky's part?

A Precisely. * * *

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HERBERT BENDELL, called as a witness on
behalf of the defendant, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. COBRIN:

Q Mr. Bendell, are you currently employed?

A Yes.

Q Whom are you employed by?

A Enco National.

Q In what capacity?

A Overseas buyer.

Q How long have you been employed by Enco?

A A little over seven years.

Q In what capacity?

A As a buyer.

Q What does the job of buyer entail?

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Bendell-direct

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2 A It is the purchasing and evaluating of mer-
3 chandise acquired overseas, imported into the United States
4 for sale by our sales force here in this country.

5 Q Does Enco do its own manufacturing?

6 A No, we don't.

7 Q Why is that?

8 A Well, we found it economically more feasible to
9 have the local factories in those countries where I visit
10 do the manufacturing for us.

11 Q Did you hear Mr. Brown's testimony this morning
12 that in 1973, March, he saw a mold copy, a copy of Enco's
13 accused tray?

14 A Yes, I did.

15 Q Is it possible he could have seen it at this
16 time?

17 A It is impossible for him to have seen this tray
18 in March.

19 Q Why would that be?

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Q Would it have been possible, Mr. Bendell, for
Mr. Brown to have seen this tray in March or April of
1973?

THE COURT: Why don't you ask him when it was
manufactured.

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Bendell-direct

102

2 A No, it would not have been possible for him to
3 see it in March or April.

4 Q Why is that?

5 A Firstly, I didn't get to Japan until the end of
6 March. I didn't get to Nagoya until the beginning of
7 April. The factory had not seen my tray -- in other
8 words, we had not discussed anything until the early part
9 of April, and subsequently to discussing it and having the
10 art work prepared and finalized there was just no way --
11 as a matter of fact, when the order was written in the
12 latter part of April, April 23 or April 27, even at that
13 time I had not seen a sample of the completed tray. That
14 order was written based upon the art work, based upon the
15 completed art work subject to approval of the samples.

16 After the order was written in Nagoya I traveled
17 to Hong Kong, Tai Won, and subsequently came back to Japan
18 some time in May, the latter part of May, and only in the
19 latter part of May did I see a handmade sample of the tray
20 depicting the various designs.

21 THE COURT: Can we really get down to the question
22 as to when it was that they were in the position to manu-
23 facture it after having received all the necessary art
24 work or descriptions or diagrams, and so forth?

25 THE WITNESS: When were they in a position?

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2 THE COURT: Yes.

3 THE WITNESS: After I saw the handmade sample.
4 They first had to make production molds.

5 THE COURT: When was the handmade sample that
6 you saw?

7 THE WITNESS: From what I can recollect, this
8 handmade sample was prepared three or four days before I
9 returned to Japan, which was the latter part of May.
10 But after that the metal molds had to be made --

11 THE COURT: I understand.

12 BY MR. COBRIN:

13 Q Mr. Bendell, do you know a Mr. Daniel Steinberg?

14 A Yes, I do.

15 Q How long do you know Mr. Steinberg?

16 A We worked for the same firm.

17 MR. COBRIN: May the record reflect I am handing
18 the witness Plaintiff's Exhibit 4.

19 THE COURT: Very well.

20 Q Did you ever discuss Plaintiff's Exhibit 4 which
21 you have before you with Mr. Steinberg?

22 A Yes, I did.

23 Q When would that be?

24 A The latter part of January, some time in February
25 of 1973.

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2 Q How did you happen to discuss with Mr. Steinberg
3 Plaintiff's Exhibit 4 which you have before you?

4 A Well, this tray was brought in by Mr. Steinberg;
5 he was out on the West Coast on business, and told me when
6 he came back that he purchased the tray some place, I
7 didn't ask him where, and we both felt -- he obviously
8 felt when he purchased the tray, and as soon as I saw the
9 tray we both felt it was a natural type of item for our
10 business, and we thereupon set about discussing various
11 ways and means of utilizing it so that we could make money
12 on it.

13 Q Was a New York tray discussed?

14 A Yes.

15 Q How did you intend to utilize it so you could
16 make money on it, referring now to the Las Vegas tray,
17 Plaintiff's Exhibit 4?

18 A Well, as far as I was concerned - and I believe
19 he felt the same way about it - it was a fairly attractive
20 tray as it was, and we saw no reason to change it.

21 As far as I was concerned, I intended to use the
22 same size, same shape, same coloring for whatever trays I
23 was going to make. The only difference is that I would
24 change the inside designs to coincide with the various
25 places that we sell throughout the country, whether it

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Bendell-direct

105

be in Atlantic City or New York or Florida or Wisconsin,
and we would use essentially the same size and finish.

Q When you say "coincide," what exactly do you
mean?

A I beg your pardon?

Q When you said "coincide," did you mean that
whatever was on the tray would coincide with the landmarks
for a particular locale?

A That is right. We would make designs for
the various locales where we intended to sell it; just
adapt the inside design.

Q Was the New York City trade to feature all New
York City landmarks?

A Yes.

Q Did you go on a buying trip in 1973 after the
discussions you had with Mr. Steinberg with respect to the
Las Vegas tray, which is Plaintiff's Exhibit 4?

A Yes, I did.

Q Where did you go?

A I went to Japan, Hong Kong, Tai Wan, Korea,
various other places in the Orient.

Q And when did you go on this trip?

A This was the latter part of March of 1973.

Q Did you while in Japan make arrangements for

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Bendell-direct

106

the manufacture of Enco's accused tray?

A Yes.

Q Whom did you make these arrangements with?

A Well, they were made with a factory by the name of Matsudo through our local agents in Nagoya.

Q Did you give any instructions to Matsudo as to what the tray would look like?

A Yes, I did.

Q Referring now, of course, to the New York City tray you were going to make?

A Yes, I did.

Q What instructions did you give Matsudo?

A Well, the instructions were that I wanted to have a tray made that was to be exactly this size, this shape, a brown wood finish color similar to the tray that I brought to him, and for it to contain New York City designs instead of the Vegas designs which were of no use to us.

Q Excuse me, which tray did you bring to Matsudo?

A This is the tray that Mr. Steinberg picked up in Las Vegas.

MR. COBRIN: Let the record reflect that this is Plaintiff's Exhibit 4.

BY MR. COBRIN:

Q Did you give any other instructions to Matsudo?

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Bendell-direct

107

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A Yes, I did.

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May I have our tray?

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Q Yes (handing).

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A When discussing the item with the factory I gave

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him specific instructions on where to place the items that

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are located and shown on this tray. Specifically I told

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him to put the Statue of Liberty in the center --

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Q Mr. Bendell, excuse me. Did you instruct

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Matsudo as to what landmarks were to be used?

11

A Yes.

12

Q And what instructions did you give him in this

13

regard?

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A I specifically mentioned the locations that I

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wanted these landmarks to appear --

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Q Did you tell him which landmarks you wanted?

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A Absolutely.

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Q Which landmarks did you tell him and why did you

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choose those?

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A Well, I specifically chose five major ones on

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here, the Statue of Liberty, Rockefeller Center, Empire

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State Building, World Trade Center and UN Building,

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because at the time they were five of the most popular

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sightseeing sites in the City. Of course, there are many

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others, but they were five of the most popular ones, and

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Bendell-direct

108

I specifically told him to put Rockefeller Center on the left, the Statue of Liberty in the center, the World Trades Center in between these two --

Q Which two are those you are referring to?

A The World Trades Center between the Statue of Liberty and Rockefeller Center, and between the Statue of Liberty and the Empire State Building I requested that he put the UN Buildings.

I further instructed him to put a plane in the lefthand corner to signify the two major airports that are well known in our City; and I also instructed him to put a rose in the position that it appears. This is a New York State flower and it has significance.

I also instructed him to make a skyline waterfront scene, and specifically instructed him to be sure that the five major landmarks are to be titled with their respective names so that these people will know what buildings they are when they get back to Timbucto.

I also instructed them to put the New York City lettering on the top, and along with all of those instructions I gave him a good deal of accompanying art work and samples of various items to proceed.

Q What was your purpose in giving them art work and samples?

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Bendell-direct

109

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2 A Well, generally speaking, that is the only way
3 that this tray could turn out with any degree of authentic-
4 ity and to make it look good, he had to have all the
5 material that I did give him.

6 It is the usual way of doing business.

7 MR. COBRIN: May I ask that the clerk mark
8 as Defendant's Exhibit A for identification --

9 THE COURT: Do you want to show it to counsel
10 first?

11 MR. COBRIN: I am going to give him a copy.
12 I have one for you also.

13 THE COURT: Do you have any objection, Mr.
14 Patton?

xx 15 (Defendant's Exhibit A marked for
16 identification.)

17 MR. PATTON: I have no objection.

18 THE COURT: If there is no objection, it will
19 be received in evidence.

xx 20 (Defendant's Exhibit A received in
21 evidence.)

22 BY MR. COBRIN:

23 Q Mr. Bendell, I show you Defendant's Exhibit A
24 in evidence and ask you if you can identify this?

25 A Yes, I can identify this as an original art work

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Bendell-direct

110

1 prepared by our art staff a few years ago. It was made
2 for a place mat that we are currently marketing, but
3 you will note that it has Rockefeller Center, Statue of
4 Liberty and the Empire State Building, which is in the
5 full drawing that was made out of this one. It also
6 contains the UN Building, the World Trades Center.
7 It contains a picture of an airplane. It also contains
8 a New York City skyline waterfront scene.
9

10 It has the New York City heading on the top,
11 and it has all of these various locations, titles, so
12 that they indicate what they are, and all of these different
13 locations appear on the tray that we made.

14 Q Was this given to Matsudo?

15 A Yes.

16 MR. COBRIN: I ask that the clerk mark as
17 Defendant's Exhibit B a place mat.

18 THE COURT: Show it to counsel first to see
19 whether we can receive it in evidence.

20 MR. PATTON: I have no objection.

21 THE COURT: All right, received in evidence.

22 (Defendant's Exhibit B received in
23 evidence.)

24 BY MR. COBRIN:

25 Q Mr. Bendell, I hand you Defendant's Exhibit B

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Bendell-direct

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2 in evidence and I ask you if you can identify that?

3 A Yes.

4 This is a place mat that was made as a direct
5 result of the art work that I just described to you.6 It is made in the United States and it has
7 been marketed by us and being sold by us since April,
8 1972.9 MR. COBRIN: I ask that the clerk mark as
10 Defendant's Exhibit C for identification a picture of the
11 Empire State Building.

12 THE COURT: Any objection?

13 MR. PATTON: No, sir.

14 THE COURT: It will be received in evidence.

15 (Defendant's Exhibit C received in
16 evidence.)

17 BY MR. COBRIN:

18 Q Mr. Bendell, I hand you Defendant's Exhibit C
19 and I ask you if you can identify that?20 A Yes, I can. This is an actual photograph of the
21 Empire State Building. It is dated July of 1954. This
22 photograph I was carrying with me at the time, and I also
23 gave this to the factory along with the various other art
24 works, because I wanted to give him as much as I possibly
25 could, and in this case it was an actual photograph of the

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1 lp Bendell-direct 112

2 Statue of Liberty, and I felt that this, too, would help
3 him in the execution of the mold that was going to be
4 made for our tray.

5 MR. COBRIN: I ask that the clerk mark --

6 THE COURT: First see if he has any objection to
7 it.

8 MR. COBRIN: -- this as Defendant's Exhibit D
9 for identification.

10 THE COURT: Any objection to this?

11 MR. PATTON: No objection.

12 THE COURT: All right, it will be received in
13 evidence.

14 (Defendant's Exhibit D received in
15 evidence.)

16 BY MR. COBRIN:

17 Q Mr. Bendell, I now hand you Defendant's Exhibit D
18 in evidence and ask you if you can identify that?

19 A Yes.

20 This is just another piece of art work with the
21 New York City design that I gave to Matsudo so that he could
22 refer to that, so his artists and mold-makers could refer
23 to it when they were executing our tray.

24 It contains the Statue of Liberty, Empire State
25 Building, Rockefeller Center, World Trades Center, New

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Bendell-direct

113

York City heading on top, and each of the various land-
marks being titled just as they are in our tray. It
was given to him.

Q You say it was given to Matsudo?

A The art work was given to the factory.

MR. COBRIN: I ask that the clerk mark as
Defendant's Exhibit E for identification what is known as
a mirror box.

MR. PATTON: No objection.

THE COURT: All right, it will be received in
evidence.

(Defendant's Exhibit E received in
evidence.)

BY MR. COBRIN:

Q Mr. Bendell, I hand you Defendant's Exhibit E
and I ask you if you can identify that?

A Yes. This is a mirror jewel box that we have
been marketing since July of 1972.

It contains the exact design I have just described,
with the World Trades Center, Rockefeller Center, Statue of
Liberty and Empire State Building with the appropriate
headings, and the New York City lettering on it.

The same design also appears on a number of
other items that we are marketing.

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Bendell-direct

114

MR. COBRIN: I ask that the clerk mark as Defendant's Exhibit F for identification a postcard which contains a depiction of the World Trades Center.

MR. PATTON: No objection.

THE COURT: All right, received in evidence.

(Defendant's Exhibit F received in evidence.)

BY MR. COBRIN:

Q Mr. Bendell, I hand you Defendant's Exhibit F in evidence and I ask you if you can identify this?

A This is a postcard that I had in my possession at the time. It is an artist's rendition of the World Trades Center. It has very nice detail and happens to be an extremely nice picture, a little bit nicer detail than some of our sketches, and I, too, felt that the factory could make some use of it when designing ours, our tray, and I gave it to him.

MR. COBRIN: I have been advised by Mr. Patton that there is no objection to this next exhibit.

THE COURT: All right.

(Defendant's Exhibit G received in evidence.)

BY MR. COBRIN:

Q Mr. Bendell, I hand you Defendant's Exhibit G

1 lp

Bendell-direct

115

2 in evidence and I ask you if you can identify this?

3 A Yes. This is another original piece of art
15 4 work created by our art staff for a particular item that
5 we are currently marketing. The art work contains the
6 Statue of Liberty, the Empire State Building, Rockefeller
7 Center. It also contains the airplane; it contains the
8 UN Building, and it has the skyline waterfront scene;
9 it has the New York City lettering in the exact style of
10 lettering that we used on our tray.

11 It also has the appropriate titles next to the
12 landmarks to indicate what they are.

13 I would also like to bring to the Court's
14 attention that on this particular piece of art work there
15 is a pencil line, an art pencil line, indicating to the
16 factory -- this was my way of indicating to him that in
17 preparing the art work for our tray I did not want to use
18 a type of straight-across front, waterfront scene. I
19 wanted the waterfront scene to be put on a curve or on an
20 arc; and subsequently this is the way it turned out on our
21 tray, and we were quite happy with it.

22 But, in any event, this particular art work
23 was prepared by us back in 1967, which was when we first
24 started to market this particular mug --

25 MR. PATTON: I didn't hear that

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2 A (Continuing) In 1967 this art work was first made
3 up. It does not contain the World Trades Center because
4 this art work predates the completion of the World Trades
5 Center.

6 Q Am I correct that Defendant's Exhibit G was
7 given to Matsudo?

8 A That is exactly right.

9 MR. COBRIN: I ask that the clerk mark as
10 Defendant's Exhibit H for identification a drinking mug.

11 Is there any objection, Mr. Patton?

12 MR. PATTON: No objection.

13 MR. COBRIN: There is no objection, I am advised,
14 to it, and may it go directly into evidence?

15 THE COURT: It will be received.

16 (Defendant's Exhibit H received in

17 evidence.)

18 BY MR. COBRIN:

19 Q Mr. Bendell, I hand you Defendant's Exhibit H
20 in evidence and ask you if you can identify this?

21 A This is the drinking mug that contains the
22 design I just mentioned to you, which was designed a number
23 of years ago. It is an American-made mug, and it has been
24 on sale since 1967.

25 MR. COBRIN: I ask that the clerk mark as

1 lp
2 Defendant's Exhibit I for identification the art work for
3 a telescope, that wraps around a telescope.

4 Do you have any objection, Mr. Patman?

5 MR. PATMAN: No.

6 THE COURT: All right, it will be received in
7 evidence.

8 (Defendant's Exhibit I received in
9 evidence.)

10 BY MR. COBRIN:

11 Q Mr. Bendell, I hand you Defendant's Exhibit I
12 and I ask you if you can identify that?

13 A Yes.

14 This is an original art work of ours that we
15 are currently using on a telescope, a child's telescope,
16 that we are selling.

17 The art work contains the Statue of Liberty,
18 the Empire State Building, the UN Building, Rockefeller
19 Center.

20 It also contains the New York City skyline, water-
21 front scene.

22 It also contains an airplane.

23 It has the lettering in two places on top and in
24 one place on the bottom, the New York City skyline, New York
25 City letterings, both encompassed in a ribbon-type of

lettering which we utilized on our tray.

It also has a type of cloud effect that the factory perhaps utilized in the execution of the tray.

And I might add that this particular telescope that we are marketing now, that we are selling now, we have been selling since July, 1971, but the art work itself, the original art work, was prepared 15 or 20 years ago.

MR. COBRIN: I ask that the clerk mark as Defendant's Exhibit J in evidence -- Mr. Patton indicated there is no objection -- a telescope.

THE COURT: All right, it will be received in evidence.

(Defendant's Exhibit J received in evidence.)

BY MR. COBRIN:

Q Mr. Bendell, I hand you Defendant's Exhibit J and I ask you if you can identify this?

A This is a telescope on which the wraparound art work that I just explained in detail was used or utilized on.

MR. COBRIN: I ask that the clerk mark into evidence Defendant's Exhibit K, which is art work for a plate.

THE WITNESS: Actually, it is a tray.

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THE CLERK: No objection?

MR. COBRIN: Mr. Patton indicated he had no objection.

MR. PATTON: No objection.

THE COURT: All right, it will be received in evidence.

(Defendant's Exhibit K received in evidence.)

BY MR. COBRIN:

Q Mr. Bendell, I hand you Defendant's Exhibit K and ask you if you can identify that?

A Well, this is an original art work prepared by our artists in our office for a bamboo tray and a bamboo pole which we are importing.

The art work contains the Statue of Liberty, the Empire State Building, the UN Building, Rockefeller Center, a picture of an airplane, with all of these landmarks titled for recognition.

It also contains a double ring of roses as an integral part of the design, these roses being the New York State flower, and it makes for a nice-looking item.

It also contains ribbon-type lettering in the center.

The actual lettering will be clearer on the actual

1 lp
2 item, but the ribbon-type lettering which we had used many
3 times in the past has proven quite popular.

4 Q Was Defendant's Exhibit K given to Matsudo?

5 A This art work was also given to Matsudo.

6 MR. COBRIN: I ask that the clerk mark in
7 evidence Defendant's Exhibit L, which is a bamboo tray
8 containing the art work of Defendant's Exhibit K.

9 Mr. Patton has indicated he has no objection.

10 (Defendant's Exhibit L received in
11 evidence.)

12 BY MR. COBRIN:

13 Q Mr. Bendell, I hand you Defendant's Exhibit L in
14 evidence and ask you if you can identify this?

15 A Yes.

16 This is the bamboo tray that utilizes the design
17 I just mentioned, with Rockefeller Center, UN, Empire State
18 Building, Statue of Liberty, an airplane, the rose design
19 and the utilization of the ribbon-type lettering.

20 It also contains a cloud effect which may or may
21 not have helped the factory, and this particular tray has
22 been marketed by us since early 1970.

23 MR. COBRIN: I ask that the clerk mark into
24 evidence as Defendant's Exhibit M the art work for a Royal
25 china plate.

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2 Mr. Patton has advised me that he has no object-
3 ion.

4 THE COURT: All right, it will be received in
5 evidence.

6 MR. PATTON: My only objections are esthetic
7 ones.

8 (Defendant's Exhibit M received in
9 evidence.)

10 BY MR. COBRIN:

11 Q Mr. Bendell, I hand you Defendant's Exhibit F
12 in evidence and ask you if you can identify this?

13 A Yes. This is an original New York City design
14 prepared by our artists.

15 This particular design is not currently being
16 utilized on any of our items, but it has good renditions
17 of the Empire State Building, Statue of Liberty, UN Building,
18 the New York skyline; it has a cloud effect in back of the
19 building.

20 All of the landmarks are titled for identi-
21 fication, and it was a good selling design eight or ten
22 years ago when it was first made up.

23 Since I had it with me I gave it to the factory
24 as just an added piece that represents work which may help
25 them.

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Bendell-direct

122

MR. COBRIN: I ask the clerk to mark into evidence as Defendant's Exhibit N art work for a wall plate.

THE COURT: All right it will be received in evidence.

(Defendant's Exhibit N received in evidence.)

BY MR. COBRIN:

Q Mr. Bendell, I hand you Defendant's Exhibit N in evidence and ask you if you can identify this?

A Yes.

This is an original art work prepared by us in our office by our artists.

This art work contains the Empire State Building, the Statue of Liberty, Rockefeller Center, World Trades Center, UN Building.

It contains an airplane; it contains a skyline, waterfront view, and all of the various landmarks so indicated by their correct titles next to each of them; and it also contains the flower, the rose flower of New York State; and this plate is currently made for us here in the United States and has been marketed and sold by us since the beginning of and around February of 1973.

It also has, by the way, the same type of lettering that was used, the exact type and style of

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Bendell-direct

123

lettering that was used in our tray.

MR. COBRIN: I ask that the reporter mark into evidence as Defendant's Exhibit O a wall plate. Mr. Patton has advised me he has no objection.

THE COURT: All right, it will be received in evidence.

(Defendant's Exhibit O received in evidence.)

BY MR. COBRIN:

Q Mr. Bendell, I hand you Defendant's Exhibit O in evidence and ask you if you can identify this.

A Yes. This is the plate that was made with the design I just mentioned to you, our original design, with all of the locations that appear on our tray, appearing on this plate, being the Empire State Building, Statue of Liberty, Rockefeller Center, World Trades Center, UN Building, the airplane, the rose, the same style of lettering, New York City lettering, and the waterfront.

MR. COBRIN: I ask that the clerk mark as Defendant's Exhibit P in evidence a collage of New York City scenes. Mr. Patton has advised me he has no objection.

THE COURT: All right, it will be received in evidence.

(Defendant's Exhibit P received in evidence.)

2 BY MR. COBRIN:

3 Q Mr. Bendell, I hand you Defendant's Exhibit P
4 and ask you if you can identify this?

5 A Yes.

6 This is what we would call a referencetype
7 art work. It was prepared by our artists in our office,
8 our original design, and in it it contains the Statue of
9 Liberty, the Empire State Building, Rockefeller Center,
10 UN Building, and the airplane.

11 It also contains the waterfront skyline scene'
12 it has the same style of lettering as the previous art work,
13 and is the exact same style that was used in our tray.

14 This particular art work is made to be cut up
15 by me to be given to various people that I worked with.

16 There is a lot of distance between the various
17 art works, between the items, so that they can be cut without
18 affecting any other piece.

19 It is an old art work going back perhaps seven
20 or eight years predating the World Trades Center.

21 Q Was this given to Matsudo?

22 A This was given to Matsudo for reference and use.

23 Q Are there any handwritten notes on that, referring
24 now to Defendant's Exhibit P?

25 A Yes, there are.

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Bendell-direct

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2 Q Could you explain to the Court what they are?

3 A Well, next to the Empire State Building and
4 Rockefeller Center I have written in in pencil for the
5 factory - it says "Full Building," and the abbreviation
6 for "building" next to both of them, and that simply meant
7 that I didn't want this building to be abbreviated when
8 we put it on the tray. I wanted him to put the whole
9 building.

10 Very often when we make a Statue of Liberty
11 we cut it, as we did on our tray and on our art work, which
12 is perfectly all right; but by making the Empire State
13 Building and Rockefeller Center I just wanted to make sure
14 that nothing was cut off, which is essentially the way it
15 did turn out; we had the top and the bottom of the buildings.

16 It was just another bit of information for him.

17 Q How would you go about using this if you wanted
18 to use this as art work for other items, referring now to
19 Defendant's Exhibit P? Would you explain that to the Court,
20 please?

21 A Well, if I were going to make a yoyo, or if I
22 were going to make a small item two or three inches in
23 diameter, I would take this art work and I would cut out
24 a particular location that I wanted to have used, whether
25 it be the Statue of Liberty or the Empire State Building,

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Bendell-direct

126

1 or any combination of them, and I would cut these out and
2 lay them on a piece of paper for the factory and tell them
3 I would want this building placed here, and this building
4 placed here, and if I wanted any other letterings I would
5 show them how I would want the lettering, and cut the
6 lettering out for him for his references.
7

8 If I wanted a very small item for an airport with
9 just an airplane on it, I would just cut the airplane out
10 and keep the rest of it for whenever I wanted to use it
11 again.

12 In this case there was so much here being used
13 I gave him the whole picture.

14 MR. COBRIN: I ask that the clerk mark into
15 evidence Defendant's Exhibit Q, an address and telephone
16 book. Mr. Patton has indicated to me he has no objection.
17 This is a small address and telephone book.

18 THE COURT: Received in evidence.

19 (Defendant's Exhibit Q received in
20 evidence.)

21 BY MR. COBRIN:

22 Q Mr. Bendell, I hand you Defendant's Exhibit Q
23 in evidence and I ask you if you can identify this?

24 A Yes, I can.

25 This is a small address and telephone book that

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Bendell-direct

127

contains an original design prepared by our office staff specifically for the item.

It has the Statue of Liberty in the center, the Empire State Building, the Rockefeller Center, with the appropriate titles next to them.

It also contains New York City lettering again in the exact same style and type of lettering that is used on the tray and many other art works.

It also has a ring of New York State roses almost completely around the whole design.

A very good seller.

Q Was that given to Matsudo?

A This was given to Matsudo for reference.

MR. COBRIN: I ask that the clerk mark as Defendant's Exhibit R in evidence a decal for a tray. Mr. Patton has indicated he has no objection to this.

THE COURT: All right, received in evidence.

(Defendant's Exhibit R received in evidence.)

BY MR. COBRIN:

Q Mr. Bendell, I hand you Defendant's Exhibit R and ask you if you can identify this?

A Yes.

This is an art work of a New York City design

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Bendell-direct

128

that was made easily more than ten years ago, perhaps 15 or 20 years would be closer to it.

It contains the Empire State Building, Statue of Liberty, Rockefeller Center and the UN Building, and it has an airplane.

It does not contain the World Trade Center because it predates this building by quite a number of years.

It has New York City lettering at the top; it has ribbon bordered, ribbon-type lettering in the center, and it has a ring of roses, New York State roses around the outside of the design.

We are not currently using this particular design on any item.

MR. COBRIN: I ask that the clerk mark into evidence as Defendant's Exhibit S an address and telephone book which is of a larger size than the one previously marked.

Mr. Patton has indicated to me he has no objection.

THE COURT: Received.

(Defendant's Exhibit S received in evidence.)

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2 BY MR. COBRIN:

3 Q Mr. Bendell, I hand you Defendant's Exhibit S
4 and ask you if you can identify that?

5 A Yes.

6 This is an address and telephone book, a larger
7 version of the one I have previously described.

8 This contains the Empire State Building,
9 Rockefeller Center, the Statue of Liberty, the same style
10 of New York City lettering that we use on our tray, a rose
11 border almost completely around the outside of it, and all
12 of the buildings are titled just like all the other items.

13 These were first marketed back in May of 1971,
14 both books.

15 MR. COBRIN: I ask that the clerk mark as
16 Defendant's Exhibit T in evidence a metal tray. Mr.
17 Patton has indicated he has no objection, your Honor.

18 THE COURT: Very well.

19 MR. COBRIN: We are also going to mark the box,
20 your Honor, because that was marked as a deposition ex-
21 hibit.

22 THE COURT: Very well. Received in evidence.

23 (Defendant's Exhibit T received in
24 evidence.)
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Bendell-direct

130

BY MR. COBRIN:

Q Mr. Bendell, I hand you Defendant's Exhibit T in evidence and ask you if you can identify that?

A This is an ashtray or pin tray or wall hanger; it is a combination type item. It can be used for a number of things. It is decorative. This was made for us by our designer.

It contains the Statue of Liberty, the Empire State Building, Rockefeller Center, the World Trade Center and the UN Building.

It also contains the New York City skyline water-front view; it contains a New York State rose; it has New York City heading in the center, and it also contains some cloud effects, but the main reason this was given to Matsudo, one of the main reasons, aside from the fact that it contained everything that is in our tray in the form of the design, it is 3-D effect, 3-dimensional effect, and this would help, and that helped him considerably in designing the molds and all the other work that went into our tray, because it has the 3-D effect as opposed to the flat 1-dimensional effect that a piece of paper has.

THE COURT: We will take a short recess.

MR. COBRIN: May we just mark these exhibits first before we recess?

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2 THE COURT: Yes.

3 (Defendant's Exhibits U, U-A, U-B, V and W
4 received in evidence.)

5 (Recess.)

6 THE COURT: I take it these exhibits have already
7 been marked, have they not?

8 THE CLERK: Yes.

9 MR. COBRIN: Exhibit U is a large Empire State
10 Building replica; U-A, a small Statue of Liberty replica;
11 and U-B, a small Empire State Building replica.

12 THE COURT: All right.

13 BY MR. COBRIN:

14 Q Mr. Bendell, I hand you Defendant's Exhibits U,
15 U-A, and U-B, and ask you if you can identify those?

16 A Yes.

17 Exhibit U is an ornament of the Empire State
18 Building made out of metal. We have been selling this
19 for ten or fifteen or twenty years. It is a 4-dimensional
20 building, and I had it with me to give to the factory to
21 further give them an idea of what the actual building looked
22 like.

23 This type of thing always helps a factory when
24 they are preparing a 3-mold, and I left that with them.

25 Exhibits U-A and U-B are miniatures of the Statue

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Bendell-direct

132

of Liberty and the Empire State Building, and both of these were given to the factory as 4-dimensional, 4-dimensional replicas of the items he was going to reproduce on our tray, and these were given for whatever help they would give the mold-maker, the artist, in preparing our item.

We have been selling these two ornaments, the Empire State Building and the Statue of Liberty, since May of 1971.

Q Mr. Bendell, just so the record is clear, could you read out the letters of the exhibits which you gave Matsudo?

A T, U, U-A, U-B, P, Q, S, R, G, I, N, K, M, F, D, C, A, and this one, No. 4.

Q Plaintiff's Exhibit 4, is that right?

A Yes.

THE COURT: Yes, that is it.

THE WITNESS: That is what I left with the maker.

Q Did Matsudo present you with a design?

A Yes.

Q Did you approve the design they presented you with?

A Not the first one.

Q Were there changes made?

A Yes, there were.

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Q Was a design finally obtained which you approved?

A Yes.

Q I hand you Defendant's Exhibit V, which is in evidence, and ask you if this is the design which you finally approved?

A Yes.

Q Mr. Bendell, I hand you Defendant's Exhibit W and ask you if you can identify that?

A Yes, this is a 3-dimensional tray that we had made by Matsudo.

Q For what locale is that?

A For Florida.

Q Was that based on the Las Vegas tray?

A Yes, it was, size and shape.

Q Does that tray, Defendant's Exhibit W, feature landmarks of Florida?

A Yes, it does.

Q Mr. Bendell, did you ever discuss with Mr. Steinberg or anybody the Arrow tray which depicts New York City since, prior to the initiation of this lawsuit?

A No.

Q Did you know of the Arrow tray which depicts New York City scenes prior to this lawsuit?

A No.

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Q Did you ever see the Arrow tray which depicts New York City scenes prior to this lawsuit?

A No.

Q Do you know Mr. Slabodsky?

A Yes.

Q How do you know him?

A He worked for our firm.

Q Did you ever discuss with Mr. Slabodsky in any manner whatsoever an Arrow tray which depicts New York City landmarks?

A No, sir.

Q Did Mr. Slabodsky have anything to do in any way whatsoever with the design of Enco's New York City tray?

A Absolutely nothing.

Q Did Mr. Slabodsky have anything to do whatsoever with the development of Enco's New York City tray?

A Nothing.

Q Did Mr. Slabodsky have anything to do whatsoever with the manufacture of Enco's New York City tray?

A No, he did not.

Q When did you first learn about an Arrow tray which depicts New York City landmarks?

A After the suit was instituted.

Q When did you first see such a tray, referring now

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2 to an Arrow tray which depicts New York City landmarks?

3 A When I returned back to New York on my recent
4 trip just a few months ago.5 MR. COBRIN: I have no further questions,
6 your Honor. * * *

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136

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CROSS EXAMINATION

BY MR. PATTON:

Q Good morning, Mr. Bendell.

A Good morning.

Q I take it, Mr. Bendell, that in your eight years at Enco that you have had occasion from time to time to visit retail stores in New York City that sell Enco products?

A Occasionally.

Q For what purpose do you visit these stores, or purposes?

A To get a feeling of the market.

Q A feeling of the market? To keep abreast of the

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Bendell-cross

137

market, in other words?

A To some degree, yes.

Q As to what is being moved on the market, basically?

A Yes.

Q So I take it you do see items manufactured by other souvenir companies in the stores?

A Yes.

Q What are the other main souvenir companies whose items are in the New York City stores?

A There are quite a few of them.

Q The major ones?

A Specialty Industries.

Q Well, Arrow is one of them, I take it?

A Yes, to a lesser degree.

Q So you do see Arrow products in the stores when you visit them, I take it?

A Well, not per se. I am sure that they are in the stores, but there is no way of knowing when you walk through the stores whether it is an Arrow product or a Specialty product, or even our product. In many cases they are exactly the same; you have no way of knowing.

Q Well, of course, what you are saying is that you don't know whether the items you see are Arrow items or not, but you do see a lot of competing items?

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Bendell-cross

138

A That is correct.

Q Now, Mr. Bendell, Enco has a design department, is that correct?

A Yes.

Q And Mr. Ficker is the head of the design department?

A Yes.

Q And are there other employees under Mr. Ficker?

A Yes.

Q Now, this design department, in fact, is innovative, as I understand it?

A Yes, that is correct.

Q And, in fact, the designs that they come up with, I take it, are original?

A That is correct.

THE COURT: Keep your voice up. It is pretty hard to hear you.

Q In fact, as I understand it, yesterday as you were describing each of the drawings that were put into evidence, you prefaced your description of each one by saying it was an original drawing, is that correct?

A Yes.

Q Of your design department?

A Correct.

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Bendell-cross

139

2 Now, you indicated yesterday, I think -- or let
3 me put it this way -- is it correct that your design
4 department did not have anything to do with the design
5 of your New York City bowl?

6 A It is not correct. They designed all of the
7 reference material that comprise that bowl.

8 Q They did not design this bowl, did they?
9 They did not do a design of this bowl?

10 A They themselves did not do a design.

11 Q Before you went to Japan did you talk to Mr.
12 Ficker about going to get a New York City design in Japan?

13 A No, I did not; I did not discuss the New York
14 City bowl.

15 Q But it is correct, isn't it, that when you went
16 to Japan, rather than taking a whole bunch of designs of
17 the State of Florida you had Mr. Ficker design the Florida
18 bowl himself?

19 A Well, his staff did design the Florida bowl,
20 yes.

21 Q His staff designed the Florida bowl?

22 A Yes.

23 Q But not the New York bowl?

24 A Correct.

25 Q When you went to Japan did you also have designs

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Bendell-cross

140

for Mount Rushmore and Pike's Peak and the other areas you were thinking of getting items for?

A No. I didn't have those designs, but they were available if I needed them out there.

Q Well, as I have it, then, when you went to Japan you didn't have one written design on paper of the New York City bowl that you wanted?

A I had all of the reference art work and just a picture in my mind's eye --

THE COURT: I think you have covered it. He did not have a bowl.

Q When you got to Matsudo, did you sit down and actually physically give them a design on paper or did you just tell them that you wanted it orally?

A Well, you have to understand that we are doing business through interpreters. Mr. Matsudo does not speak English very well, but when the instructions were given to Matsudo through our agent and the artist, and whoever was seated in our room, specific instructions were given to him more than just orally. What I mean to say is, I made a tracing outline of the bowl, and on the paper I indicated with circles rather than draw the actual Empire State Building, I indicated with a long oval circle where the Empire State Building was to be, and in that circle

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Bendell-cross

141

I wrote "Empire State Building."

Subsequently I did the same thing with the Statue of Liberty and the same thing with Rockefeller Center, and these are all circles without drawing the actual items with the titles indicating the location, the approximate locations where these things were to appear.

Q Did you produce these writings in court yesterday?

A No, I did not.

Q Where are they?

A They were discarded. There was no reason to keep them after the final art work was finished out there. There was just absolutely no reason to keep them.

Q How many drafts of this item did Matsudo go through before they arrived at the final draft which you introduced yesterday?

A To the best of my recollection there were three drafts.

Q And you have produced the final draft?

A That is correct.

Q Where are the first two drafts?

A Well, there again they were discarded. If you do business in Japan you learn through bitter, hard

lp Bendell-cross

experience that if something can go wrong it will go wrong, and if you have a final draft that is good, then you get rid of the items that had to be corrected in the past, because there is always a chance that these guys will pick up the wrong drawing and refer to it by accident when you are not there. There is no reason to keep it.

Q So you destroyed it?

A That is exactly right.

Q Now, yesterday you identified a large number of exhibits of New York City drawings that you said you left with Matsudo, is that correct?

A I didn't leave that many exhibits; I left a lot of art work with them.

Q You did leave a lot of art work?

A The exhibits I did specify I left, I left.

Q You left those with Matsudo?

A Yes.

Q I take it the exhibits that were introduced yesterday of the drawings are copies of what you actually left with Matsudo?

A No, they are not.

Q In other words, I assume that you did not actually leave this telephone directory with Matsudo, or that one there on your desk here with Matsudo, Exhibit S?

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Bendell-cross

143

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2 A No, on the contrary.

3 Q That is the actual one?

4 A That is correct.

5 When I was in the Orient and I received word
6 while I was out there that we were in some sort of a suit
7 with Arrow, before I left the Orient I took from the factory,
8 and who, in turn, had returned these to our agent, I took
9 these things back from him. He had no further use for
10 them; our item was all made up; it had been shipped; it
11 had been marketed; there was no reason to keep it, and I
12 just felt in my mind that this might be needed for this
13 lawsuit. I didn't know how far it had gone or didn't go,
14 but I had nothing to lose by taking them back.

15 So these, in fact, this one, this one, this one
16 (indicating), the two books and my tray, the Vegas tray,
17 I took with me.

18 Q The items in front of you here are the actual
19 ones that you took?

20 A Not all these, no.

21 Q I know you didn't take all. The ones on the
22 desk you did take are the actual ones themselves and not
23 copies of them? I understand you did not take them all?

24 A No.

25 MR. PATTON: Okay.

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Bendell-cross

144

MR. COBRIN: Your Honor, may the record reflect the witness nodded and then said "No"?

THE COURT: He has already indicated. He gave us a list of the actual items yesterday, so we don't have to repeat it further.

MR. PATTON: No, it is clear now.

THE COURT: Yes, it is clear now.

BY MR. PATTON:

Q Did you tell the Matsudo people that they could use these or cut them up or mark them up or do what they wanted with them in order to produce this (indicating?

A I told them they could do what they wanted with them, but I do know that they did make copies also.

Q They made copies?

A Yes.

Q Now yesterday, Mr. Bendell, you said that you told the Matsudo people virtually -- that you told them a number of things about what you wanted on a New York City tray, and that you were pretty specific about what you wanted on this tray, is that correct?

A That is correct.

Q Now, was that testimony of yesterday, to the best of your recollection, everything that you told the Matsudo people about what you wanted?

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Bendell-cross

145

2 A To the best of my recollection.

3 Q Well, then, whose idea was it to put these little
4 feet on the bottom of this Plaintiff's Exhibit 3?

5 A That evolved rather strangely. That evolved
6 this way: originally when I had given them my tray, the
7 Las Vegas tray --

8 Q This does not have any feet on the bottom?

9 A That is correct.

10 Q Nor does it have a hanger for the wall as does
11 Plaintiff's Exhibit 3, is that correct?

12 A That is correct. But I did want it as a hanger
13 also along with being a regular bowl. So when I originally
14 gave him this sample I specifically asked him if it were
15 possible, when he was making this mold, to make a hanging
16 device, some sort of protrusion with a hole in it here,
17 not affect the inside of the tray, but for there to be a
18 little hole with a piece of plastic sticking out here so
19 that the item could be hung along with being used as a flat
20 tray.

21 Well, after a while, and after studying it,
22 he came back to me and told me that it wasn't possible,
23 but that he was still working on some possible way, and
24 it was just a technical problem of not being able to take
25 it out of the mold with this certain protrusion that I

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2 wanted.

3 Afterwards, when I had gotten back to New York
4 I had received samples from the factory, samples that were
5 made from the mold that was prepared, and at that time the
6 sample that I received from the factory had -- the sample
7 I had from the factory, the first couple of samples that
8 they went to me for final approval, so to speak, of the
9 molded piece had two protrusions coming out here
10 (indicating), two feet. It had one here and one here
11 (indicating), with a piece of cord, because this is the
12 normal way that they hang plates, ceramic plates, with a
13 piece of cord coming through two holes, but the first two
14 samples only had these two pieces here (indicating).
15 This was as far ahead as they could think. And after
16 seeing the sample, it was just unacceptable, it was
17 ridiculous, but that is the way they made it, because by
18 putting only these two feet, these two hangers here, it
19 would hung the plate all right, but in putting it on the
20 table you had a ridiculous situation.

21 Q It would not be even?

22 A Therefore I just instructed them to put the
23 same -- not the same two, actually -- they put two more on
24 the bottom just to even the thing out so that the thing
25 could lay straight, and if this is the best they could do,

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Bendell-cross

147

1 this is the way we proceeded, period. That is how it
2 happened they had four feet on the bottom.
3

4 Q The Las Vegas tray has no such feet on the back;
5 it has no such hanger on the back?

6 A Frankly, I think mine is an improvement.

7 Q I am just asking, yes or no?

8 A It does not.

9 Q It is correct also, isn't it, that the Arrow
10 tray, Exhibit 2, also has feet or a hanger on the back?

11 MR. COBRIN: I object. That speaks for itself.

12 THE COURT: Yes, it does.

13 MR. PATTON: Yes, your Honor.

14 Q Would you take a look at your tray, the New York
15 City tray. On the back of it it says "Copyrighted Enco
16 in Japan."

17 Was that item copyrighted by Enco in Japan?

18 MR. COBRIN: I object. This is entirely ir-
19 relevant.

20 THE COURT: I will permit it.

21 MR. COBRIN: It is also incorrect. It does not
22 say it is copyrighted in Japan. Counsel has misinterpreted
23 it.

24 MR. PATTON: If I may -- I beg your pardon --
25 it says C in a circle, 1973, Inco, Inc., Japan.

MR. COBRIN: "Japan" is on another line, your Honor.

BY MR. PATTON:

Q Well, what does that mean? I am sorry if I misspoke myself.

A Well, this is a copyright notice in accordance with certain basic copyright notices that I have been led to believe is satisfactory and --

Q I am sorry but I have to interrupt so we can get the flow of this.

Did you tell Matsudo to put that on the back of that tray?

A Yes, I did.

Q Did you thereafter take any steps to register a copyright for that item?

A Well, this was --

THE COURT: Yes or no? Let's proceed here. I have stayed out of this but I am not going to any more. Yes or no? You heard the question. Can you answer that yes or no? Let's proceed.

Did you take any steps?

THE WITNESS: No, I didn't take any steps.

THE COURT: Did the defendant, Enco, take any steps to do it, to your knowledge?

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Bendell-cross

149

2 THE WITNESS: To my knowledge, no.

3 THE COURT: Next question.

4 MR. PATTON: Thank you.

5 BY MR. PATTON:

6 Q Now, among these many designs that you gave to
7 Matsudo that you introduced yesterday, there are many, many
8 New York City features other than those appearing on that
9 tray, are there not?

10 A That is correct.

11 Q There is Madison Square Garden?

12 A Yes.

13 Q There is --

14 THE COURT: Is Madison Square Garden in any of
15 the art work that you have?

16 THE WITNESS: Yes -- you mean the art work I
17 gave to the factory?

18 THE COURT: Yes.

19 THE WITNESS: Yes.

20 BY MR. PATTON:

21 Q And there is Times Square?

22 A Yes.

23 Q And there are bridges of New York City?

24 A Yes.

25 Q And there are many other New York scenes that are

2 not depicted in Plaintiff's Exhibit 3, is that correct?

3 A That is correct.

4 Q Mr. Bendell --

5 BY THE COURT:

6 Q Do you have any correspondence with respect to the
7 different forms and so forth that were represented by Enco to
8 Japan or by Japan to Enco? You said that you got a mold
9 in which they only had two feet on it. Do you have that
10 or is that destroyed? Or did you ever see it, or when did
11 you see it, and so forth?

12 A No, I don't have the correspondence with me.

13 Q Was it correspondence or did they actually send
14 you an item that had that?

15 A They sent me an item.

16 Q What happened to that item?

17 BY MR. PATTON:

18 Q They sent you mold samples, didn't they?

19 A They were considered first shots, yes.

20 BY THE COURT:

21 Q What happened to them? Do you have those avail-
22 able, or what?

23 A No, your Honor.

24 Q They have been destroyed?

25 A They have been destroyed.

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2 THE COURT: All right, proceed.

3 BY MR. PATTON:

4 Q Mr. Bendell, unlike Mr. Steinberg you did talk
5 to salesmen about a New York City bowl before you went to
6 Japan, didn't you?

7 A I didn't speak to any more people than Mr.
8 Steinberg did. Actually I spoke to Mr. Steinberg and Mr.
9 Duclos.

10 Q Who else did you speak to? Who else?

11 A That would cover it.

12 Q At your deposition on June 15, 1974, at page 20
13 were you asked these questions and did you give the follow-
14 ing answers --

15 MR. COBRIN: Your Honor, I think it is clear
16 he was asked the questions if they are in his deposition.

17 MR. PATTON: I am just following the form.

18 THE COURT: I will permit it.

19 Q "Q Had you discussed with anyone at Enco the
20 fact that you were going to seek to order a New York City
21 tray based on these designs?

22 "A Yes.

23 "Q Who had you talked with?

24 "A Specifically?

25 "Q Yes.

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2 "A Mr. Steinberg, the sales manager, Mr. Duclos,
3 vice-president, Mr. Heller, vice-president, and various
4 other salesmen."

5 MR. PATTON: Skipping down now to line 22 on
6 page 21:

7 "Q Let me make sure I understand you.

8 "You talked to Mr. Duclos, Mr. Steinberg, Mr.
9 Heller and who else?

10 "A And there could have been three or four other
11 salesmen in the office at any one given time. They come in
12 and out and if they're around and I feel I can get some
13 beneficial information or sage advice from them, I just
14 speak to them off the cuff or whatever. You know, it's just
15 informal conversation. Showing them an item.

16 "Q I take it you get some kind of ideas from them
17 of what kinds of items they want to sell?

18 "A That's right."

19 Is that correct?

20 A Yes.

21 Q So that you did talk to salesmen about the New
22 York City bowl before you went to Japan?

23 A I did speak to Mr. Heller about the New York City
24 bowl.

25 Q Did you speak to three or four salesmen?

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2 A I did speak to other salesmen who were in our
3 office at the time, but when I spoke to other salesmen
4 regarding the bowl it was not about the New York City bowl.

5 BY THE COURT:

6 Q Did you ever talk to Mr. Slabodsky about the
7 New York City bowl?

8 A No, I did not.

9 Q Was Kersten your other representative in New
10 York City?

11 A No, sir.

12 Q He was not?

13 A No, sir.

14 Q I thought you said --

15 A He was in the office but I didn't speak to him.

16 Q You didn't speak to him?

17 A No.

18 Q And these items were going to be marketed in
19 New York City, is that correct, the New York City bowl?

20 A Yes.

21 BY MR. PATTON:

22 Q You didn't speak to Mr. Slabodwky but you spoke to
23 other salesmen?

24 A I spoke to other salesmen --

25 Q Did you? Yes or no.

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Bendell-cross

154

2 A Yes.

3 Q What territory did the other salesmen cover?

4 A One salesman was in the Cape Cod area; another
5 salesman was in the Florida division; some went out in
6 the Wisconsin area.

7 Q Areas other than New York City?

8 A That is correct.

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10 H E R B E R T T. F I C K E R, called as a witness on
11 behalf of the defendant, being first duly
12 sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. COBRIN:

15 Q Mr. Ficker, are you currently employed?

16 A Yes.

17 Q And whom are you employed by?

18 A Enco National Corporation.

19 Q And in what capacity?

20 A Head of the Special Order Department and art
21 director of the company.

22 Q How long have you been employed by Enco?

23 A 19 years.

24 Q In what capacity?

25 A I just explained, as --

lp

Ficker-direct

156

1

2

Q In the same capacity that you are now?

3

A Yes, head of the special order department and

21

4

art director.

5

Q Mr. Ficker, I hand you Defendant's Exhibit A --

6

THE COURT: If you like you can pull the lectern

7

up here and work from that.

8

Q I show you Defendant's Exhibit A.

9

Do you recognize this as being original art work

10

with Enco?

11

A Yes, sir, I do.

12

THE COURT: Are you finished with that now?

13

MR. COBRIN: Yes.

14

THE COURT: Let me see that, please.

15

(Exhibit handed to court.)

16

Q Mr. Ficker, I hand you Defendant's Exhibit D.

17

Do you recognize this as being original art work with Enco?

18

A Yes.

19

MR. COBRIN: Would you like to see this one,

20

your Honor?

21

THE COURT: Yes.

22

(Exhibit handed to Court.)

23

BY MR. COBRIN:

24

Q Mr. Ficker, I hand you Defendant's Exhibit G

25

and ask you, do you recognize that as being original art

1 lp Ficker-direct 157
2 work for Enco?
3 A Yes, I do.
4 THE COURT: Let me have Exhibits 2 and 3.
5 (Exhibits referred to handed to Court.)
6 Q Mr. Ficker, I hand you Defendant's Exhibit I.
7 Do you recognize this as being original art work for Enco?
8 A Yes, sir, I do.
9 Q Mr. Ficker, I hand you Defendant's Exhibit K.
10 Do you recognize this as being original art work for Enco?
11 A Yes, sir, I do.
12 Q Mr. Ficker, I hand you Defendant's Exhibit M
13 and ask you if you recognize this as being original art
14 work for Enco?
15 A Yes, sir, I do.
16 Q Mr. Ficker, I hand you Defendant's Exhibit N.
17 Do you recognize that as being original art work for Enco?
18 A Yes, I do.
19 Q Mr. Ficker, I hand you Defendant's Exhibit P.
20 Do you recognize this as being original art work for Enco?
21 A Yes, sir, I do.
22 Q Mr. Ficker, I hand you Defendant's Exhibit Q.
23 Do you recognize this as containing original art work for
24 Enco?
25 A I do.

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lp

Ficker-direct

158

Q Could you speak up, Mr. Ficker?

A Yes, sir, I do.

Q Mr. Ficker, I hand you Defendant's Exhibit S.

Do you recognize this as containing original art work for Enco?

A Yes, sir, I do.

Q Mr. Ficker, I hand you Defendant's Exhibit T and ask you to look inside it. Do you recognize it as containing original art work for Enco?

A Yes, sir, I do. * * *

* * *

CROSS EXAMINATION

BY MR. PATTON:

Q Mr. Ficker, did you speak with Mr. Bendell concerning the obtaining of a New York City bowl before March of 1973 when he went to Japan?

A No, sir.

Q Did you know that a New York City bowl was going to be ordered by Mr. Bendell in Japan --

A No, sir.

1 Q -- at that time?

2 A No.

3 Q When did you first learn about Enco's New York
4 Citybowl, Plaintiff's Exhibit 3?

5 A When I first heard of the suit by Arrow against
6 Enco, that was the first time.

7 Q You did not know about the existence of Enco's
8 bowl until this lawsuit was started?

9 A No.

10 Q Pardon me?

11 A No, sir.

12 Q Now, before Mr. Bendell went to Japan did he
13 talk to you about with the designing of a Florida bowl?

14 A No, sir.

15 Q To your knowledge did he speak to anyone in the
16 art department about a Florida bowl?

17 A Yes, sir.

18 Q He spoke to someone else?

19 A Yes, sir.

20 Q Were you aware at that time that a Florida bowl
21 was being designed in your department?

22 A No, sir.

23 Q Now, Mr. Ficker, I take it that ordinarily your
24 art department is responsible for designing the original and
25

lp

Ficker-cross

160

innovative art work of Enco, is that correct?

A Most times, sir.

Q Most times?

A Yes.

Q And, in fact, your department was responsible for the design of the Florida tray that was produced by Matsudo?

A Yes, my art department.

Q And your art department is responsible for the art that goes on all of the exhibits, I believe C through W, that were introduced yesterday through Mr. Bendell?

A Most of them.

Q Most of them?

A Yes.

Q Prior to April of 1973 had Enco ever designed anything which had all of the elements present on Plaintiff's Exhibit 3 which his Honor is reviewing at the moment?

THE COURT: I will give that to you (handing).

THE WITNESS: Will you repeat the question?

Q My question is, Mr. Ficker, prior to April of 1973 had, to your knowledge, Enco ever designed any work of art which had each and every element that is present on Plaintiff's Exhibit 3, which is that bowl?

A Yes.

lp

Ficker-cross

161

Q Every element?

A Yes.

Q In one place?

A Well, for example, sir, this is perhaps what we are speaking about (indicating). This is a piece of art work done by our staff.

THE COURT: Which is Exhibit what?

MR. PATTON: He is referring to Defendant's Exhibit P.

THE COURT: Defendant's Exhibit P?

MR. PATTON: Yes.

THE COURT: I think the question is: Does that contain everything that is contained on Exhibit 3, which is the bowl?

THE WITNESS: Well --

THE COURT: Is that the question, Mr. Patton?

MR. PATTON: Yes, sir.

THE WITNESS: No, sir.

BY MR. PATTON:

Q Defendant's Exhibit P does not have a World Trade Center, does it?

A No.

* * *

157 a

PLAINTIFF'S EXHIBIT 1

COPYRIGHT CERTIFICATE NO. Gp23714

Certificate 158 a

Registration of a Claim to Copyright

in a work of art or a model or design for a work of art

FORM G

CLASS

REGISTRATION NO.

G

Gp

23714

DO NOT WRITE HERE

This is To Certify that the statements set forth on this certificate have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

William F. Rose
 Register of Copyrights
 United States of America

1. Copyright Claimant(s) and Address(es):

Name **ARROW, accepted alternative designation of ARROW NOVELTY CO., INC.**
 Address **62 West 14th St. New York 11, N.Y.**

Name

Address

2. Title:

DESIGN OF NEW YORK CITY ON TRAY

3. Nature of Work:

SCULPTURE

4. Optional Deposit:

Basis for claiming option:

☐ Monetary value (retail value per copy)

☐ Weight (in pounds) **1 lb. 2 oz.**
☐ Size (give dimensions) **10 1/2" X 11 3/4"**
☐ Fragility (give details) **sculpture on plastic composition**

5. Author (i. e., Artist):

Name **ARROW NOVELTY CO., INC.**

Citizenship **U.S.A.**
 (Name of country)

Domiciled in U. S. A.

Yes
☒ X

No

Address

62 West 14th St. New York 11, N.Y.

6. (a) Date of Publication:

October 12, 1955

(b) Place of Publication:

U.S.A.

(c) Manufacture Outside United States:

(Name of country)

7. (a) Previous Registration or Publication:

☐ Previous registration

☐ Previous publication

(b) New Matter in This Version:

Complete all applicable spaces on next page

8. Deposit account:

159 a

9. Send correspondence to:

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(Type or print name and address)

Name	ARROW NOVELTY CO., INC.	
Address	62 West 14th St.	
	(Number and street)	
	New York	N.Y.

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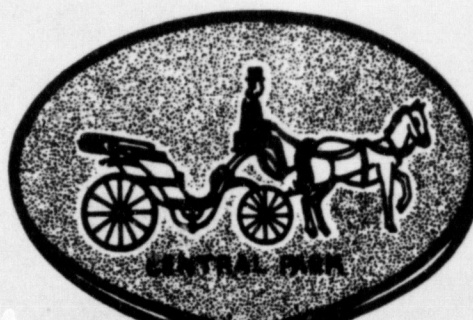
160 a

DEFENDANT'S EXHIBIT A

ENCO ART WORK



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GARDEN

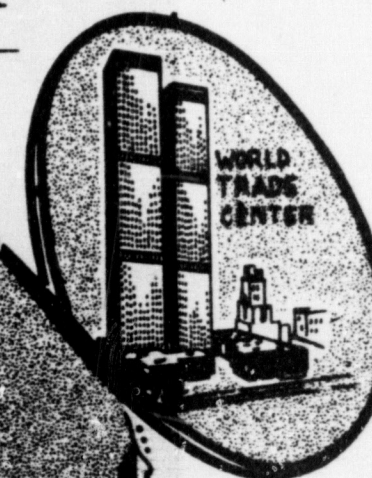


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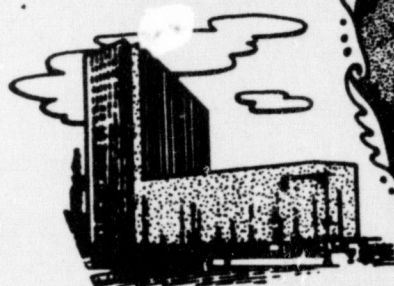
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UNITED NATIONS
SECRETARIAT BUILDING



WORLD
TRADE
CENTER



NEW YORK
COLISEUM

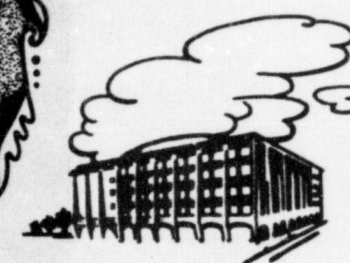
NEW YORK CITY



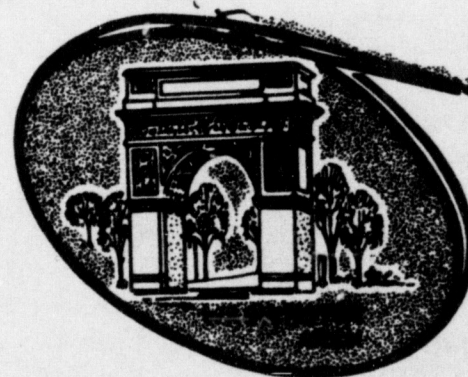
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CENTER



LINCOLN CENTER



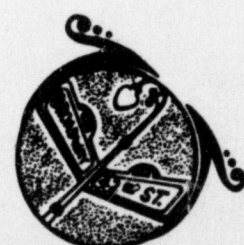
CITY OF WONDERS



TIMES SQUARE



JOHN F. KENNEDY
INTERNATIONAL
AIRPORT



175 a
162 a

DEFENDANT'S EXHIBIT C

PICTURE OF EMPIRE STATE BUILDING

163 a



1572
1405
164 a

LET'S XB: 11
DATE 6/15/74
ANTHONY WERNER

This is a new and impressive photo of the always impressive Empire State Building, high above the New York skyline. It was taken from two blocks away at 32nd Street and Fifth Avenue with a special camera equipped with hypergon lens stopped to F 4.5. A 1/25th of a second exposure was used along with a pumper bulb - depending on the light.

FOR: EMPIRE STATE BUILDING CORPORATION

FROM: Jay Scott
Benjamin Sonnenberg
247 Park Avenue
New York City

Plaza 5-2200

7/1/54

PHOTO GRATIS

165 a

DEFENDANT'S EXHIBIT D

ENCO ART WORK

166 a

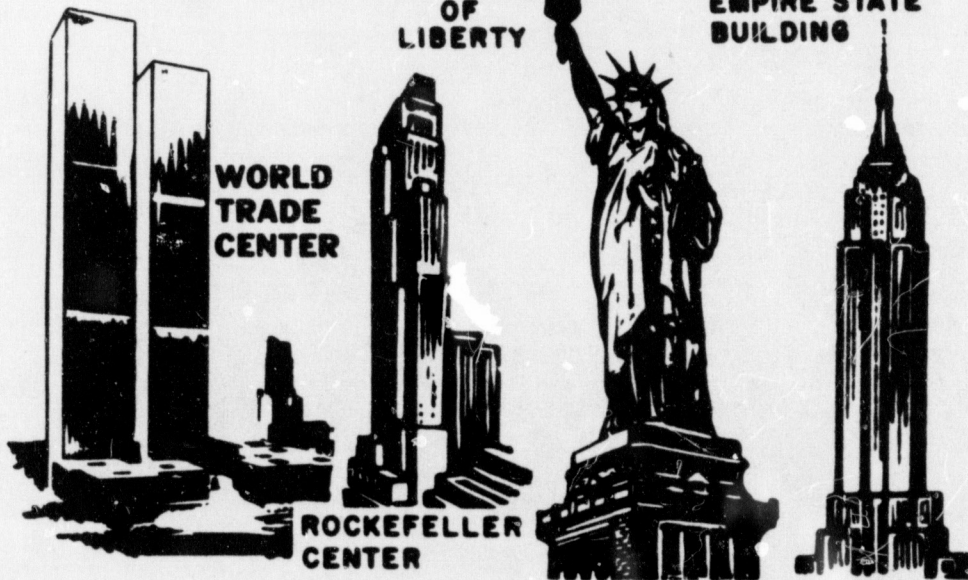
New York City

STATUE
OF
LIBERTY

EMPIRE STATE
BUILDING

WORLD
TRADE
CENTER

ROCKEFELLER
CENTER

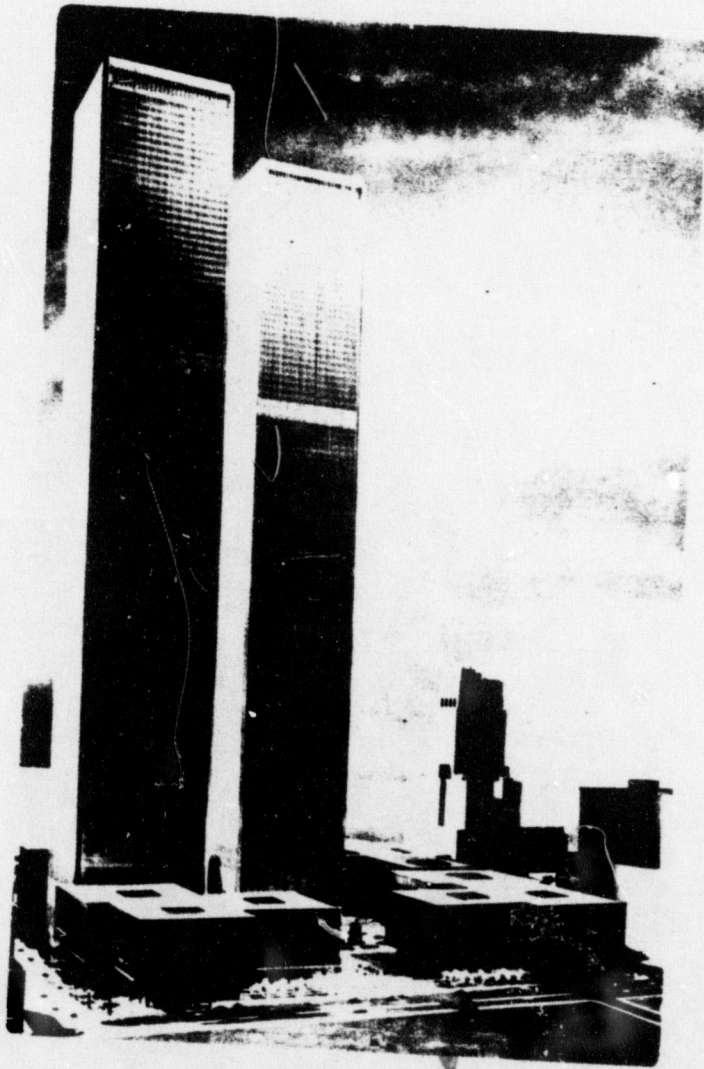


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DEFENDANT'S EXHIBIT F

POSTCARD CONTAINING ARTIST'S RENDITION
OF THE WORLD TRADE CENTER

168 a



169 a

DEFENDANT'S EXHIBIT G

ENCO ART WORK

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INTERNATIONAL
AIRPORT



LA C
AIR



Madison S
Garden Co

NEW YORK CITY

TIMES SQUARE

ROCKEFELLER
CENTER

STATUE
OF
LIBERTY

EMPIRE STATE
BUILDING

UNITED NATIONS
BUILDINGS

NY

GUARDIA
PORT

Square
center

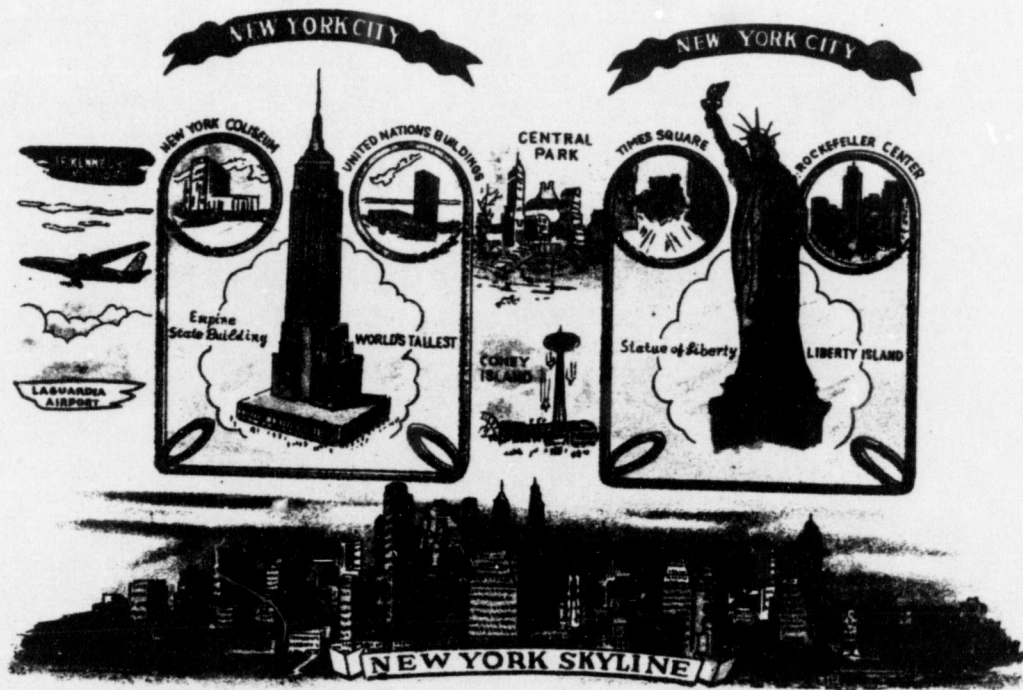
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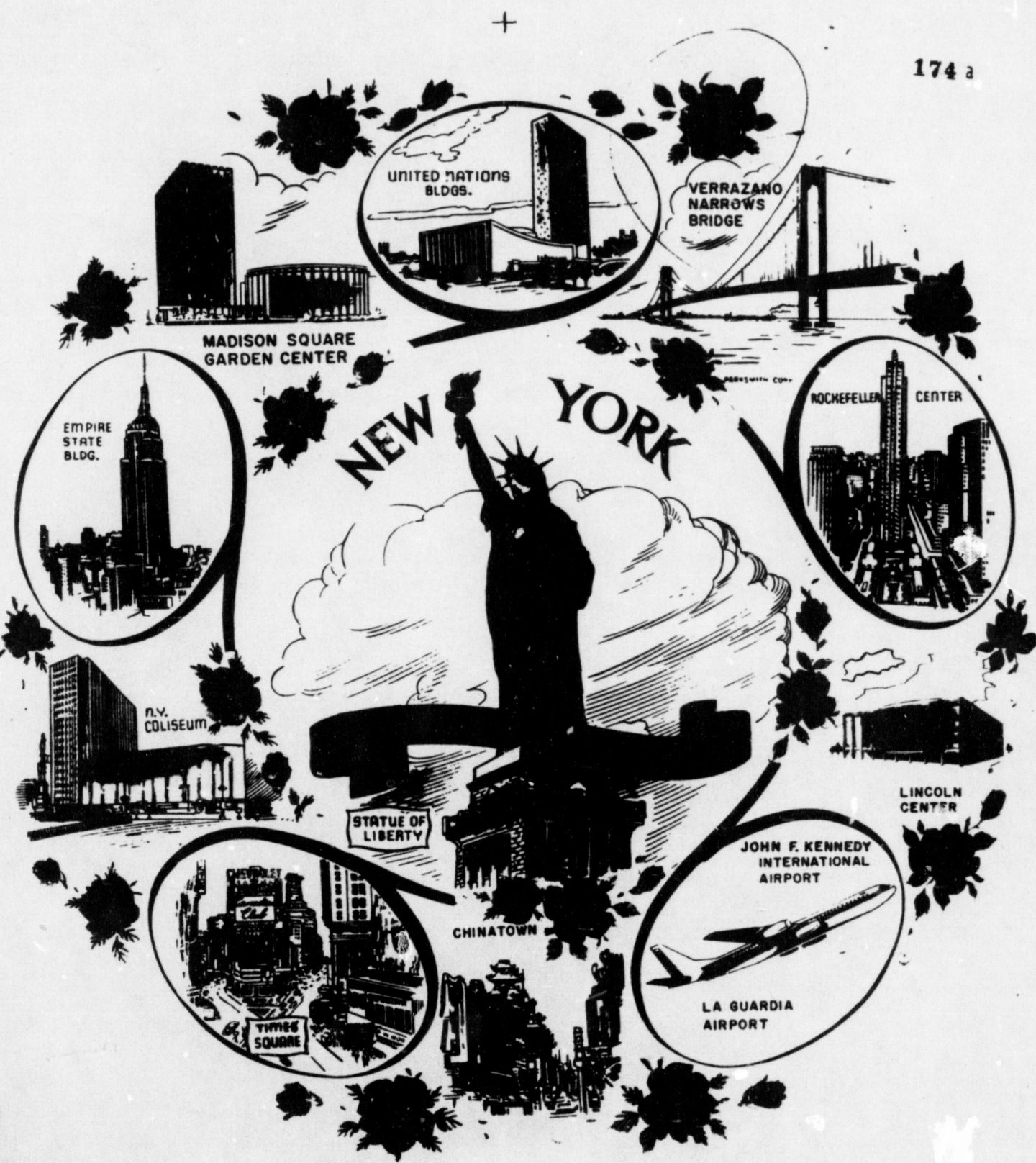
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ENCO ART WORK



UNITED NATIONS
BLDGs.

VERRAZANO
NARROWS
BRIDGE

MADISON SQUARE
GARDEN CENTER

EMPIRE
STATE
BLDG.

ROCKEFELLER
CENTER

NEW YORK

N.Y.
COLISEUM

STATUE OF
LIBERTY

LINCOLN
CENTER

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AIRPORT

LA GUARDIA
AIRPORT

CHINATOWN

TIMES
SQUARE

175 a

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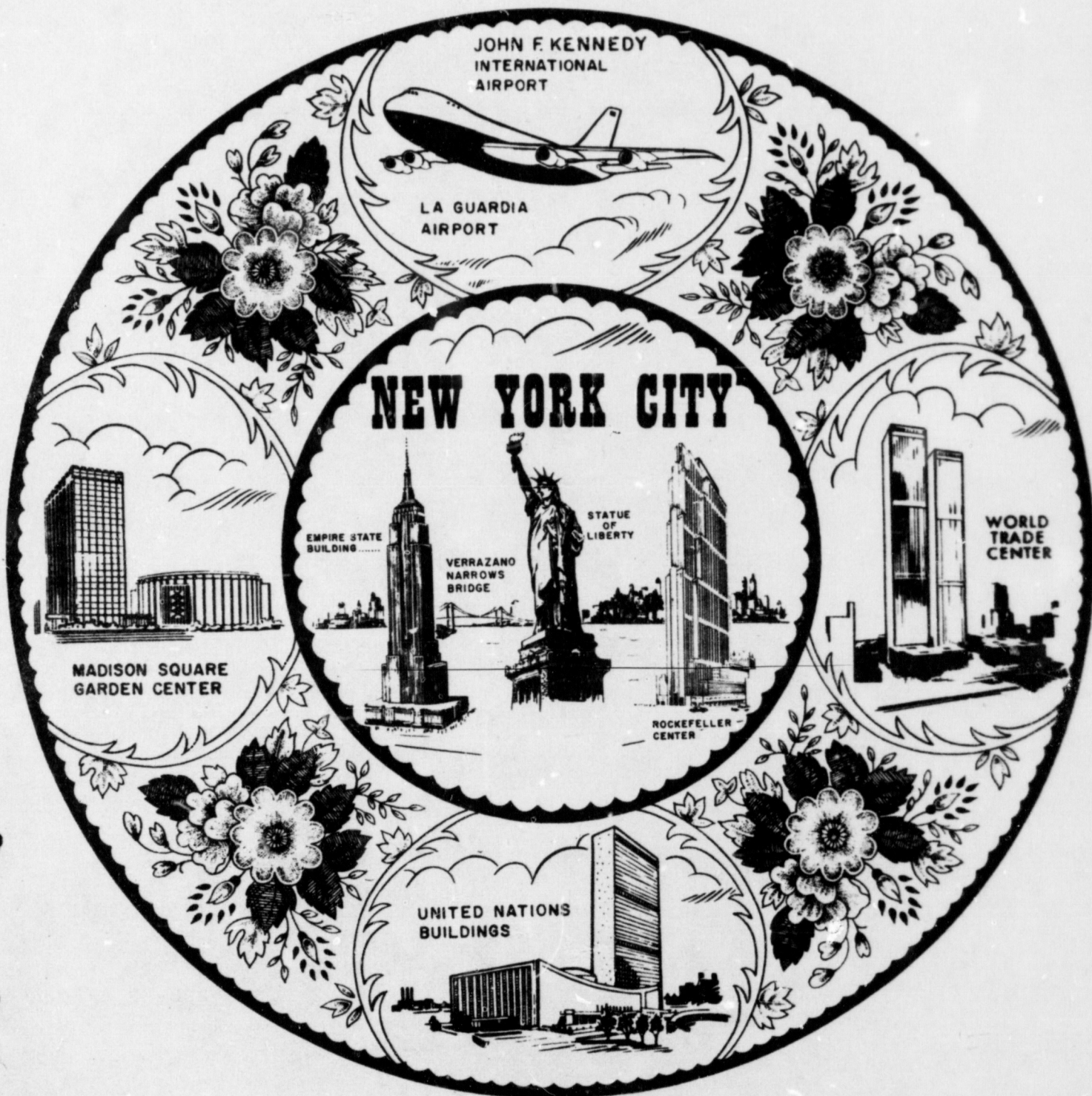
ENCO ART WORK



177 a

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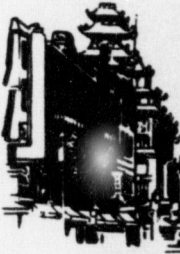


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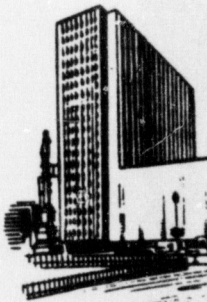
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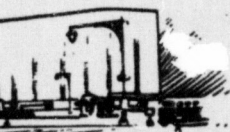
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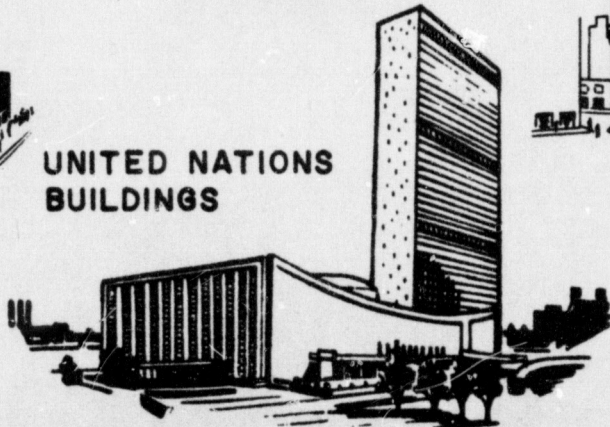


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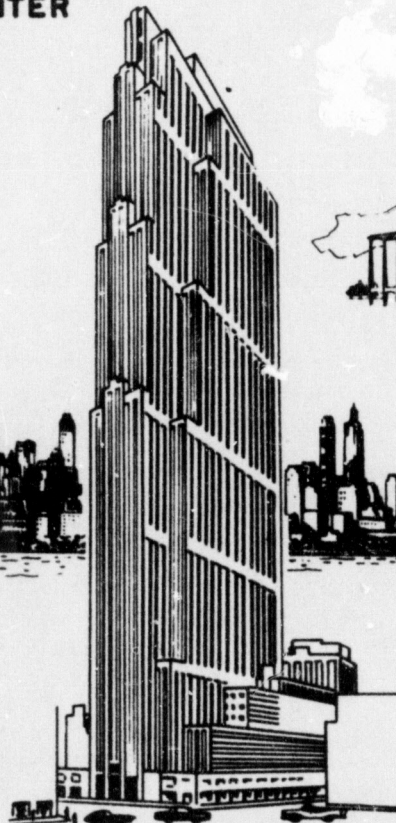


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UNITED NATIONS
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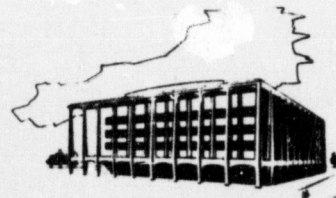


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DEFENDANT'S EXHIBIT R

ENCO ART WORK

182 a



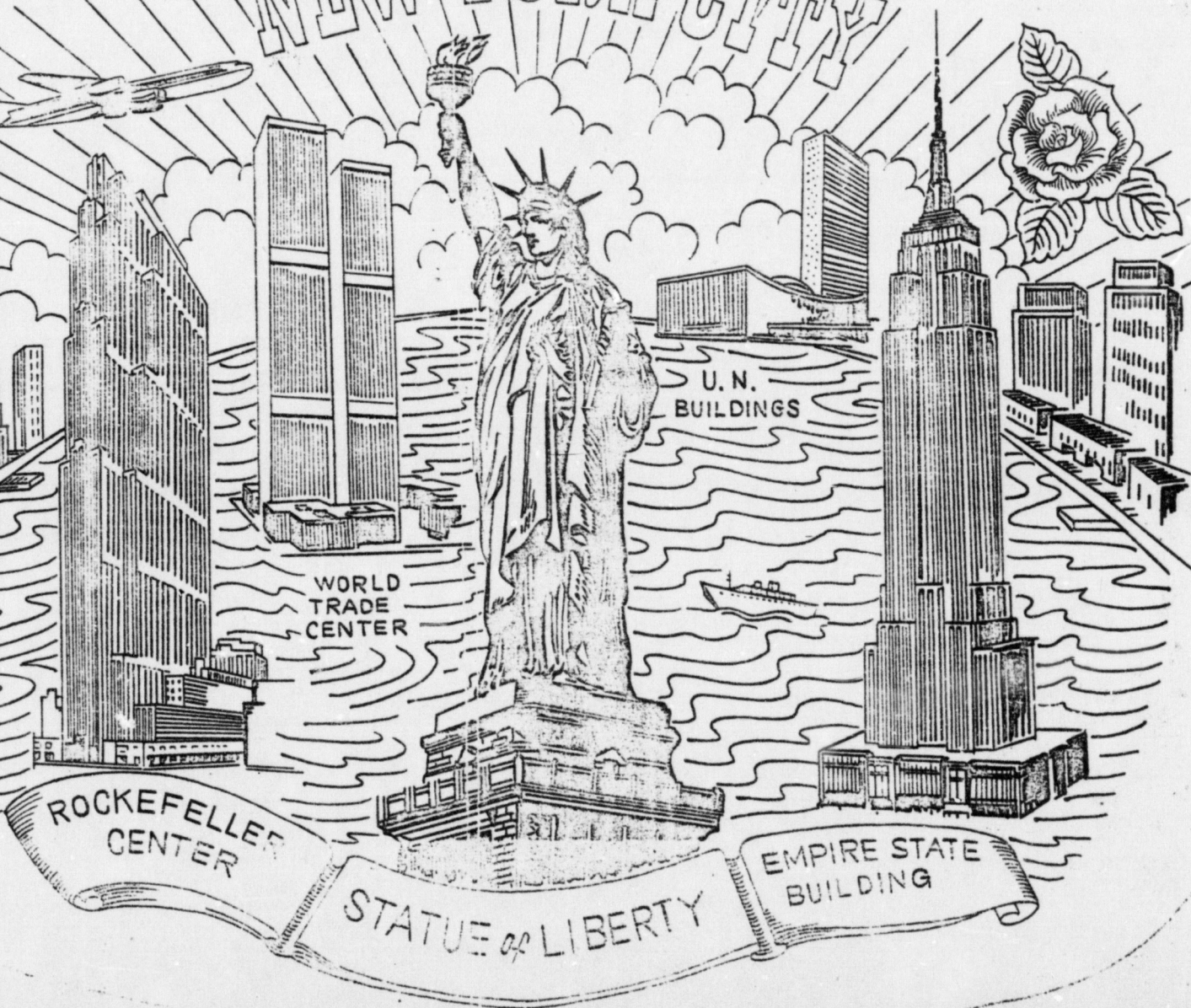
183 a

DEFENDANT'S EXHIBIT V

DESIGN FOR ENCO ACCUSED TRAY



NEW YORK CITY



9/13/59
100